No. 01-298-CFX
Status: GRANTED

Title: Paul D. Lapides, Petitioner
v.
Board of Regents of University System of Georgia, et al.

Docketed:
August 20, 2001

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Bederman,David Jeremy

Counsel for respondent: Orland,Devon

Entry	Date	Note	Proceedings and Orders
1	Aug 20 2001	G	Petition for writ of certiorari filed. (Response due September 25, 2001)
3	Aug 28 2001		Order extending time to file response to petition until September 25, 2001.
4	Sep 25 2001		Brief of respondents Board of Regents of the University System of Georgia, et al. in opposition filed.
5	Oct 10 2001		DISTRIBUTED. October 26, 2001 (Page 15)
6	Oct 29 2001		Petition GRANTED. SET FOR ARGUMENT February 25, 2002. **********
7	Dec 7 2001		Time to file petitioner's brief on the merits extended to and including December 20, 2001.
8	Dec 19 2001	X	Brief of petitioner Paul D. Lapides filed.
12	Dec 19 2001	X	Joint appendix filed.
9	Dec 20 2001		Brief amicus curiae of the United States filed.
11	Dec 20 2001		Brief amicus curiae of Ceres Marine Terminals, Inc. filed.
10	Dec 21 2001		CIRCULATED.
13	Jan 16 2002	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
14	Jan 22 2002	X	Brief of respondent Board of Regents of University System of GA, et al. filed.
15	Jan 22 2002	X	Brief amicus curiae of States of Texas, et al. filed.
16	Jan 24 2002	G	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
17	Feb 15 2002		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
18	Feb 15 2002		Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument GRANTED.
19	Feb 25 2002		ARGUED.

Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

PAUL D. LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a state waive its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court and then seeks a dispositive ruling?

LIST OF PARTIES BELOW

In addition to the parties reflected in the caption, also defendants in the proceedings below were Edwin A. Rugg (personally and in his capacity as Vice-President of Academic Affairs, Kennesaw State University (KSU)), Timothy Mescon (individually and in his capacity as Dean of Coles College of Business at KSU), and Teresa J. Covin (personally and in her capacity as Chair of the Department of Management & Entrepreneurship at KSU). Mr. Mescon was later dismissed without prejudice from the suit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Paul D. Lapides, respectfully prays that a writ of certiorari issue to review the May 24, 2001, opinion and judgment of the U.S. Courts of Appeals for the Eleventh Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit, *Lapides v. Board of Regents of the University System of Georgia*, No. 00-14984 (11th Cir. May 24, 2001), is reported at 251 F.3d 1372, and is reprinted at App. 1a. The U.S. District Court's Order of September 8, 2000, is unreported but is reprinted at App. 12a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit of May 24, 2001. The Supreme Court has jurisdiction to review cases from the Courts of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition questions whether states waive their Eleventh Amendment immunity when they remove a case from state court to federal court. The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law

or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. Respondents jointly removed a complaint filed in state court to federal court, under the authority of 28 U.S.C. §§ 1441, 1443 & 1446, reprinted in pertinent part at App. 29a-33a.

STATEMENT

1. Petitioner, Paul D. Lapides, is a professor at Kennesaw State University (KSU), part of the State University System of Georgia under its Board of Regents ("Regents"). Aggrieved because of various personnel actions taken against him by KSU administrators, Lapides brought suit in Superior Court of Cobb County, State of Georgia, on March 9, 2000, naming as defendants the Regents and three KSU administrators in both their personal and official capacities. See, *supra*, at (ii). Lapides' complaint sounded in common law tort, but also included an allegation that defendants had violated his constitutional due process rights.

On April 13, 2000, attorneys for the State of Georgia filed two Answers in Cobb County Superior Court, one on behalf of the Regents and the other for the individual defendants. Both Answers asserted as an affirmative defense sovereign immunity and Georgia's Eleventh Amendment immunity.

On the same day, Georgia's lawyers filed a Notice of Removal in the U.S. District Court for the Northern District of Georgia. See App. 34a. The Notice asserted a right of removal under 28 U.S.C. §§ 1441 & 1446, insofar as Georgia contended Lapides' complaint sought recovery under 42 U.S.C. § 1983 and

Title VII of the Civil Rights Act, id. § 2000(e) *et seq*. Georgia did reserve any defenses available to it under state and federal law. See App. 35a. Georgia filed the statutorily-required notice in Cobb County Superior Court, staying further proceedings in state court.

With its Removal Notice filed in federal court, Georgia then sought, on the same day, to dismiss the entirety of Lapides' complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). See App. 37a. The State of Georgia argued that a 12(b)(6) dismissal – a disposition with prejudice – was required on the grounds that "Defendants have Eleventh Amendment immunity." App. 38a.

2. Lapides resisted the removal of the case to federal court and sought remand. After extensive briefing, in which the attorneys for the State of Georgia made certain representations as to their intentions for the litigation, the District Court denied the motion to remand. See App. 15a-17a. The District Court then denied Georgia's Motion to Dismiss on Eleventh Amendment grounds, holding that Georgia had waived its immunity by removing the case to federal court and then seeking a dispositive ruling on the merits. See App. 19a-24a.

Drawing from this Court's decisions in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), and *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998), the District Court concluded that Georgia's litigation conduct amounted to an "unequivocal" waiver of Eleventh Amendment immunity. App. 20a. The District Court found support in decisions from the First, Seventh, Ninth and Tenth Circuits holding that various forms of litigation conduct by state officials – including removal of cases to federal court – constituted a valid waiver, irrespective of the authority of those officials under state constitutions or statutes to waive the Eleventh Amendment bar.

See App. 21, 23a-24a. The District Court also relied upon this Court's precedents that a state's voluntary intervention in a federal case to assert its own claim amounted to a waiver of the Eleventh Amendment. See App. 21 (citing *Clark v. Barnard*, 108 U.S. 436, 447-448 (1883); *Missouri v. Fiske*, 290 U.S. 18, 24-25 (1933); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276 (1959)).

Although the District Court denied Georgia's Motion to Dismiss on Eleventh Amendment grounds, it did grant dismissal on Lapides' section 1983 claims against the two named defendants in their personal capacities. The remainder of Georgia's grounds for dismissal were rejected.

3. Georgia took an interlocutory appeal from the District Court's ruling that it had waived its Eleventh Amendment immunity, and the Court of Appeals reversed. App. 1a.

The Court of Appeals recognized that there was a split in Circuit authority on whether a state's litigation conduct constitutes a waiver of the Eleventh Amendment bar. See App. 4a, 9a (indicating that the Tenth Circuit has ruled in the affirmative). The panel nonetheless felt itself constrained by earlier Circuit precedent, *Silver v. Baggiano*, 804 F.2d 1211 (11th Cir. 1986), which required that in order for a state attorney to waive Eleventh Amendment immunity there must be state constitutional or statutory authorization. The Court of Appeals held that, under Georgia's Constitution, no authorization had been granted to Georgia's Attorney General to waive Eleventh Amendment immunity. The panel regarded this as consistent with this Court's holding in *Ford Motor Co. v. Dept. of Treas. of Indiana*, 323 U.S. 459, 467 (1945). See App. 4a-6a.

In the opinion below, the Eleventh Circuit confined this Court's earlier holdings of state waivers through litigation conduct, irrespective of authority under state law, to the

ostensibly unique bankruptcy context of those cases. See App. 7a (distinguishing *Gardner v. New Jersey*, 329 U.S. 565, 573-74 (1947); *Gunter v. A. Coast Line R. Co.*, 200 U.S. 273, 284 (1906); *Clark*, 108 U.S. at 447). The panel also chose not to give any weight to Justice Kennedy's concurrence in *Schacht*, 524 U.S. 381, which specifically addressed the propriety of states removing cases to federal court and then asserting an Eleventh Amendment bar. The Eleventh Circuit regarded *Schacht* at least as tangentially validating its ruling that states do not waive Eleventh Amendment immunity, even if they remove cases to federal court. See App. 9a ("While Justice Kennedy's concurrence may provide some insight as to how he, at least, would come out on the issue in the future, we are presently bound by the actual holding of *Schacht*.").

Despite its conclusion, the Court of Appeals appeared perplexed by Georgia's litigation posture in this case. See App. 8a-9a ("[W]e are also troubled by the seemingly inconsistent positions of the State by both asserting that the federal courts have jurisdiction to obtain removal, while simultaneously arguing with equal force that the federal courts do not have authority to hear the claims because of Eleventh Amendment immunity . . . ."); App. 10a-11a & n. 4 ("[T]he State removed to theoretically take advantage of our superior knowledge of the federal questions involved in the case. . . . This is, in fact, what the State argues in its brief for this case. Therefore, we proceed based on their arguments and disregard the possibility that the assertion of sovereign immunity may in fact lead to a situation in which there are no claims over which the federal courts have jurisdiction.").

The Court of Appeals reversed and remanded to the District Court, which was "instructed to hear only those non-barred claims over which it has jurisdiction and remand the others to state court. If no such non-barred federal questions

exist, the whole case is to be remanded to state court." App. 11a. The Court of Appeals did not, however, ascertain whether any of Lapides' claims would survive Georgia's assertion of Eleventh Amendment or other sovereign immunity defenses.

REASONS FOR GRANTING THE PETITION

COURTS ARE DIVIDED ON WHETHER A STATE'S REMOVAL OF A CASE TO FEDERAL COURT WAIVES ITS ELEVENTH AMENDMENT IMMUNITY

1. This Petition invites the Court to settle an issue that has bedeviled its Eleventh Amendment jurisprudence for many years and has now resulted in a profound dissonance in the decisions of the courts of appeals. At issue is whether a state's affirmative litigation conduct in removing a case to federal court constitutes a waiver of that state's Eleventh Amendment immunity. This is so particularly when the state subsequently seeks a dispositive ruling from the federal court, and irrespective of any authority that state's law may confer on the government attorneys who handled the matter. The Court's resolution of this issue would provide needed guidance on whether, or to what extent, states can invoke federal court jurisdiction only to later repudiate that choice. While Petitioner recognizes that states are afforded special treatment under the Eleventh Amendment, they are not exempt from principles of fundamental fairness in the pursuit of their litigation objectives.

This case thus involves a species of waiver contemplated in the Court's seminal Eleventh Amendment decisions and consistently renewed over the course of the past years. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985)

("a State will be deemed to have waived its immunity 'only where stated "by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." ' " Id. (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909))). The kind of waiver implicated here is not, however, one contained in a state statute, nor in the conditionalities of Congressional funding for federal programs and activities, see *South Dakota v. Dole*, 483 U.S. 203 (1987), nor in a state's course of dealing in the marketplace in the now-discredited doctrine of *Parden v. Terminal Railway of the Alabama State Docks Dep't*, 377 U.S. 184 (1964). See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999). Rather, the waiver raised in this case is one resulting from the litigation conduct of states in invoking the jurisdiction of the federal courts, foregoing the immunity otherwise conferred by the Eleventh Amendment.

2. In reaching the conclusion it did, the Eleventh Circuit relied on one strand of this Court's sovereign immunity case law, the principle stated in *Ford Motor Co. v. Dep't of Treas. of the State of Ind.*, 323 U.S. 459 (1945), that any waiver of the Eleventh Amendment bar through litigation "conduct" be authorized under applicable state constitutional or statutory provisions. See id. at 464, 466. Finding no such authorization as a matter of state law, this Court held there was no waiver of immunity where Indiana's Attorney General merely appeared to answer a tax refund suit. Especially important to this Court's ruling in *Ford Motor* was its observation that tax refund suits against states should be heard in state courts. See id. at 470.

The *Ford Motor* Court also recognized that its decision was in tension with a line of cases which held that states waive their Eleventh Amendment immunity when they affirmatively invoke the jurisdiction of the federal courts or otherwise engage

in litigation behavior accepting federal court jurisdiction. See id. at 469 (citing *Gunter v. Atl. Coast Line*, 200 U.S. 273 (1906)). This rule originated in *Clark v. Barnard*, 108 U.S. 436 (1883), holding as an "elemental proposition" that the Eleventh Amendment

> is a personal privilege which [a state] may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction. . . . Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination.

Id. at 447-48. So in *Clark*, Rhode Island's appearance to make a claim in the proceeding — even with a demurrer — constituted a waiver of Eleventh Amendment immunity. See id. at 448. This rule was endorsed in *Gunter*, 200 U.S. at 284 ("[W]here a state voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment."), and in *Missouri v. Fiske*, 290 U.S. 18, 25 (1933), even though the Court ruled that the state's intervention as a party defendant was too limited in that instance to qualify as a waiver of the Eleventh Amendment bar.

While this Court has never amplified its principle in *Ford Motor* of the necessity of state law authorization for waivers of Eleventh Amendment immunity, it has reaffirmed the rule of *Clark v. Barnard* that certain kinds of litigation conduct engaged in by state attorneys will be deemed a waiver. In *Gardner v. New Jersey*, 329 U.S. 565 (1947), a state's filing a

proof of claim in bankruptcy was held to be waiver. See id. at 573-74; see also *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276 (1959) ("a State may waive [Eleventh Amendment immunity] at its pleasure . . . as by a general appearance in litigation in a federal court . . . .") (citation omitted). Indeed, this Court as recently as two years ago sweepingly endorsed the rule in these terms: "*Gardner v. New Jersey* . . . held that a bankruptcy court can entertain a trustee's objections to a claim filed by a State, [and] stands for the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts." *Coll. Sav. Bank*, 527 U.S. at 681 n.3 (citation omitted).

This tension in the Court's jurisprudence of Eleventh Amendment waivers has been observed by lower courts and commentators. See *Hill v. Blind Indus. & Servs. of Maryland*, 179 F.3d 754, 760-63 (9th Cir. 1999); *California Mother Infant Program v. California Dep't of Corrections*, 41 F. Supp.2d 1123, 1127-29 (S.D. Cal. 1999); Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1387 (2001) ("The history of the *Ford Motor Co.* approach . . . is uneven . . ."). And whether the Eleventh Amendment is viewed more as a subject-matter jurisdictional bar, as suggested in *Edelman v. Jordan*, 415 U.S. at 678, or as a waivable "personal privilege," as enunciated in *Clark v. Barnard*, 108 U.S. at 447, still remains to be settled. In any event, the narrow question presented by this Petition — whether a state's removal of a case to federal court is a waiver of any possible objection to federal court jurisdiction — certainly remains open.

Indeed, this Court's recent ruling in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381 (1998), appears to have reserved that question for a later day, even as it held that the

presence in an otherwise removable case of a claim barred by the Eleventh Amendment does not destroy removal jurisdiction that would otherwise exist. See id. at 393 ("we have neither reached nor considered the argument that, by giving its express consent to removal of the case from state court, Wisconsin waived its Eleventh Amendment immunity.") (Kennedy, J., concurring). As Justice Kennedy observed in *Schacht*, "these questions should be explored." Id. at 397. The Eleventh Circuit nonetheless appeared to regard *Schacht* as ostensibly ruling that removal does not constitute a waiver, or at least not so clear a holding as to justify a departure from its previous precedent in *Silver v. Baggiano*, 804 F.2d 1211 (11th Cir. 1986).[1] Aside from this issue meriting "explor[ation]," as Justice Kennedy noted in *Schacht*, there is a palpable need to harmonize these discordant aspects of Eleventh Amendment case law, and to develop a uniform rule as to when certain forms of litigation conduct will constitute waivers of states' immunity from federal court jurisdiction.

3. If the issue raised in this Petition was a consequence only of the application of this Court's broad Eleventh Amendment principles, it would still justify plenary review. But the question whether a state's litigation conduct — of which removal of cases to federal court is just one example — can be a waiver of Eleventh Amendment immunity, has now resulted in a clearly-acknowledged division in Circuit authority in numerous cases. See App. 4a, 9a (where the court below indicated that the Tenth Circuit has held that a state's removal of a case constitutes a waiver, irrespective of the authority to waive under state law).

[1] *Silver* was cited by the Court in *Schacht* as among the cases that gave rise to the circuit split that motivated the grant of certiorari in that matter. 524 U.S. at 385-86.

a. On the particular question of whether a state's removal of a case is a waiver, the Eleventh Circuit's position has support from decisions from the Sixth and Seventh Circuits. See *Gwinn Area Community Schools v. Michigan*, 741 F.2d 840, 847 (6th Cir. 1984); *Estate of Porter ex rel. Nelson v. Illinois*, 36 F.3d 684, 691 (7th Cir. 1994). Both these decisions emphasized the question of authority mooted by this Court in *Ford Motor* and concluded that state law had not authorized the state attorneys who had removed the case to actually waive the sovereign's Eleventh Amendment immunity.[2]

On the other side of the ledger, the First and Tenth Circuits have unambiguously held that removal is a waiver, and the decisions of those courts have not sought to analyze the authority of the state Attorney General whose litigation conduct was at issue. In *Newfield House, Inc. v. Mass. Dep't of Public Welfare*, 651 F.2d 32 (1st Cir.), cert. denied, 454 U.S. 1114 (1981), the First Circuit noted that

> the state's actions here seeking removal, arguing in opposition to plaintiff that the Eleventh Amendment did not bar federal jurisdiction over either the case as a whole or pendent claims in particular, . . . and pressing a counterclaim in federal court present a far clearer case of waiver than does a mere appearance.

Id. at 36 n.3 (citations omitted).

If anything, the Tenth Circuit has been even more emphatic in its opinions. In *Gallagher v. Continental Ins. Co.*, 502 F.2d 827 (10th Cir. 1974), that court found a waiver where

[2] Curiously, the Seventh Circuit noted that its decision in *Estate of Porter* contradicted its earlier ruling in *Vargas v. Trainor*, 508 F.2d 485, 492 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975), which had held that Illinois had waived its immunity by removing a case to federal court, irrespective of the authority of the state Attorney General.

Colorado "made a general appearance, joined in the removal petition and the resistance to plaintiffs' remand motion, [and] moved to dismiss for failure to state a claim. . . ." Id. at 830. Likewise, in *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226 (10th Cir. 1999), the Tenth Circuit ruled that Utah had waived its sovereign immunity by removing a case to federal court and then seeking a Rule 12(b)(6) dismissal with prejudice. See id. at 1235. The Tenth Circuit in *Sutton* also observed that this Court's decision in *Schacht* did not reach the question of whether a state categorically waives its immunity by removal. See id. at 1234. Finally, the *Sutton* court held that it simply did not matter that Utah law did not authorize its Attorney General to waive its Eleventh Amendment immunity; his litigation conduct in removing the case and seeking a dispositive ruling was found to be an "extraordinarily effective waiver." Id. at 1235 (quoting *Richins v. Industrial Constr., Inc.*, 502 F.2d 1051, 1056 (10th Cir. 1974)). That a state attorney general can waive Eleventh Amendment immunity by removing a case, irrespective of authority under state law, was reaffirmed by the Tenth Circuit in *McLaughlin v. Board of Trustees of State Colleges of Colorado*, 215 F.3d 1168, 1171-72 (10th Cir. 2000), a decision which primarily relied on Justice Kennedy's concurrence in *Schacht*. See id. at 1171 (quoting 524 U.S. at 397 (Kennedy, J., concurring)).

b. If the division in Circuit authority with the removal cases were not worrisome enough, the schism is replicated with other forms of litigation conduct which can constitute a state's waiver of the Eleventh Amendment bar. See also MOORE'S FEDERAL PRACTICE 3D § 123.41[2] (2000). While the courts of appeals have been understandably reluctant to find a waiver where a state merely appears to answer a complaint in federal court, or files a counter-claim, some have done so. Compare *Paul N. Howard Co. v. Puerto Rico Aqueduct Sewer Auth.*, 744

F.2d 880, 886 (1st Cir. 1984), cert. denied, 469 U.S. 1191 (1985) (finding waiver), with *Santee Sioux Tribe of Nebraska v. Nebraska*, 121 F.3d 427, 431 (8th Cir. 1997) (no waiver) and *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385 n.4 (10th Cir. 1997) (same). At the other end of the spectrum, the vast majority of decisions from the courts of appeals have held that where a state files a proof of claim in a federal bankruptcy proceeding that is a conclusive waiver of Eleventh Amendment immunity, notwithstanding any assertion that the state's lawyers lacked authority to waive.[3]

Analytically similar to the waiver-by-removal issue are those cases where states have been found to forego their Eleventh Amendment immunity by participating in federal court litigation to such an extent as to evince a clear intent of waiver. See, e.g., *Hill*, 179 F.3d at 758-60 (state entity "chose to defend on the merits and proceed to trial."); *Hankins v. Finnel*, 964 F.2d 853, 856-58 (8th Cir.) ("Although the State of Missouri never entered a general appearance in this case, it did seek to take advantage of the suit for its own benefit."), cert. denied, 506 U.S. 1013 (1992); *Mitchell v. Comm'n on Adult Entertainment Establishments of the State of Delaware*, 12 F.3d 406, 408-09 (3d Cir. 1993) ("The Commission not only failed

[3] For a representative sampling of cases on this point, see *In re Lazar*, 237 F.3d 967, 976-78 (9th Cir. 2001); *In re Burke*, 146 F.3d 1313, 1318-20 (11th Cir. 1998), cert. denied, 119 S.Ct. 2410 (1999); *In re Platter*, 140 F.3d 676, 679-80 (7th Cir. 1998); *In re 995 Fifth Ave. Asocs.*, 963 F.2d 503, 507 (2d Cir.), cert. denied, 506 U.S. 947 (1992); *WJM, Inc. v. Mass. Dep't of Public Welfare*, 840 F.2d 996, 1002-03 & n.8 (1st Cir. 1988) (all holding waiver). Contra *In re Creative Goldsmiths of Washington, D.C.*, 119 F.3d 1140, 1148-49 (4th Cir. 1997), cert. denied, 523 U.S. 1075 (1998); *Magnolia Venture Capital Corp. v. Prudential Securities, Inc.*, 151 F.3d 439, 443-45 (5th Cir. 1998) (both holding no waiver because of lack of authority by state attorney general).

to appeal the judgment that overruled its eleventh amendment defense, it affirmatively embraced that judgment."); *Garrity v. Sununu*, 752 F.2d 727, 738 (1st Cir. 1984) ("New Hampshire's conduct here reflects 'unequivocal consent' to the jurisdiction of the federal court in this matter. The state has affirmatively complied with most of the court's implementation order — never once objecting on grounds of the eleventh amendment or sovereign immunity."). These decisions stake-out an even broader range of litigation conduct qualifying as an Eleventh Amendment waiver than the removal cases. This wider circle of precedents hold that a state need not itself invoke federal jurisdiction in order to waive the Eleventh Amendment bar, and that acquiescence in the exercise of that jurisdiction can suffice to evince waiver.

4. If any conclusions can be drawn from this fractured picture of precedents it is that states are more likely to have waived their Eleventh Amendment immunity where they have sought to affirmatively invoke federal court jurisdiction (through removal, filing of a proof of claim, or third-party intervention), and then to have sought some benefit by seeking a dispositive ruling (such as a Rule 12(b)(6) dismissal) or collateral advantage from the federal proceeding. See *Sutton*, 173 F.3d at 1235; see also *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (12(b)(6) motion is a request for dispositive ruling). It is, of course, precisely where the state is disappointed in the pursuit of its litigation strategy that it has cause to later regret its conduct, and then to assert the Eleventh Amendment bar.

In these situations, courts of appeals have indicated that it risks fundamental unfairness to allow states to remove cases to federal court, to demand dispositive rulings, and when frustrated that federal judges do not oblige, to *then* seek dismissals based on Eleventh Amendment immunity. See *Newfield House*, 651 F.2d at 36 n.3 ("[Massachusetts'] attempt

now to invoke the Eleventh Amendment would if allowed work a virtual fraud on the federal court and opposing litigants."); *Sutton*, 173 F.3d at 1236 ("The Attorney General's Office having caused the removal to federal court here, and having litigated throughout on the merits here, we feel it would be . . . grossly inequitable to allow assertion of the Eleventh Amendment bar. . . ."). These sentiments were certainly echoed in Justice Kennedy's concurrence in *Schacht*, where he observed that

> [i]n permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. . . . Even if appearing in federal court and defending on the merits is not sufficient to constitute a waiver, a different case may be presented when a State under no compulsion to appear in federal court voluntarily invokes its jurisdiction.

524 U.S. at 394-95 (Kennedy, J., concurring).

Removal should constitute a unique form of litigation conduct that unambiguously waives a state's objection to federal court jurisdiction under the Eleventh Amendment.[4] This is not to suggest that states may not, when they remove cases, preserve any common-law or statutory sovereign immunities they otherwise possess. But what states are waiving by removal is

[4] One aspect of this categorical form of waiver is the federal statutory basis for removal. See 28 U.S.C. §§ 1441, 1443, 1446; App. 29a-33a. To the extent the Eleventh Circuit's decision casts into doubt the applicability of these statutes in the Eleventh Amendment context, this Petition raises similar issues to those in *Raygor v. Regents of the Univ. of Minnesota*, Docket No. 00-1514 (cert. granted June 4, 2001), reviewing 620 N.W.2d 680 (Minn. 2001) (holding unconstitutional 28 U.S.C. § 1367(d)'s tolling provision in cases where states are parties).

their forum immunity to federal court adjudication of the causes of action contained in the complaint. Where, as here, a state removes a case to federal court and then seeks a dispositive ruling on the merits by filing a Rule 12(b)(6) motion, see App. 38a, it is beyond cavil that the state "voluntarily invokes [the] jurisdiction" of the federal courts, and should not be suffered to later protest that its attorneys lacked the necessary authority to effectuate such a waiver.[5] The authorization requirement of *Ford Motor* should be simply inapplicable where the state removes the cause to federal court.

In granting review, this Court would not be obliged, therefore, to reach the issue of whether the authorization of state officers to waive the Eleventh Amendment bar is subject to some federal law considerations of apparent authority or judicial estoppel, notwithstanding provisions of state constitutional or statutory law to the contrary.[6] Federal jurisdiction should not solely depend on state law formalities. Petitioner would contend, in any event, that there is adequate authority under

[5] This submission is entirely consistent with this Court's ruling in *Schacht*, and a categorical rule of waiver would be vastly superior to the *ad hoc* test propounded by the Eleventh Circuit here, see App. 11a & n.4, which vaguely sought to distinguish barred from non-barred claims, even as Georgia had originally sought to dismiss the entirety of the case from federal court on Eleventh Amendment and other sovereign immunity grounds. See App. 38a.

[6] There is a split in the circuits as to whether statutory language, such as that enacted by Georgia, O.C.G.A. §§ 20-3-36, 45-15-3(6), reprinted App. 5a-6a, constitutes sufficient authorization. The court below ruled in the negative, App. 6a, while the Tenth Circuit in *McLaughlin*, 215 F.3d at 1171, held that Colorado's similar statute was an effective authorization. See also *Candela Corp. v. Regents of the Univ. of Calif.*, 976 F. Supp. 90, 91-92 (D. Mass. 1997).

Georgia statutes for its Attorney General to accept federal court jurisdiction by removal, and thus waive the state's Eleventh Amendment immunity to that extent.

Petitioner believes that the issue raised herein is ready for the "explor[ation]" that Justice Kennedy called for in his concurrence in *Schacht*. See 524 U.S. at 397. The problem of Eleventh Amendment waivers through state litigation conduct has, if anything, proliferated since this Court's decision in *Schacht*, and resolution of the question would demarcate the contours of the Eleventh Amendment bar for practitioners throughout the land.[7] This case squarely presents the question as addressed by the Eleventh Circuit below — and by four other courts of appeals in discordant decisions over the past decade. The matter is ready for the "full briefing and argument, in some later case," as Justice Kennedy envisioned. Id. at 398.

[7] Some commentators are in accord. See, e.g., Laura B. Bartell, *Getting to Waiver - A Legislative Solution to State Sovereign Immunity in Bankruptcy after* Seminole Tribe, 17 BANKR. DEV. J. 17 (2000); Karen Cordry, *Logic, Waiver and Claims: What's Happening with the 11th Amendment?*, 10 AM. BANKR. INST. J. 8 (June 2001); Note, *Reconceptualizing the Role of Constructive Waiver after* Seminole, 112 HARV. L. REV. 1759 (1999); Leah M. Krider, Note, *Removal and Waiver of the Eleventh Amendment*, 74 IND. L.J. 1019 (1999).

CONCLUSION

For the foregoing reasons, the Petition should be GRANTED.

Respectfully submitted,

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[8] Counsel acknowledges the assistance of Ms. Erica Cohen in the preparation of this Petition.

Appendix

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

Paul D. LAPIDES, Plaintiff-Appellee,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, Edwin A. Rugg, Personally and in his capacity as Vice-President of Academic Affairs at Kennesaw State University, et al., Defendants-Appellants.

No. 00-14984
May 24, 2001

Appeal from the United States District Court for the Northern District of Georgia. (No. 00-00953-CV-TWT-1), Thomas W. Thrash, Judge.

Before WILSON and COX, Circuit Judges, and RYSKAMP*, District Judge.

WILSON, Circuit Judge:

The issue is whether a state's removal of a case to federal court constitutes a waiver of Eleventh Amendment immunity. We decide that it does not.

* Honorable Kenneth L. Ryskamp, U.S. District Judge for the Southern District of Florida, sitting by designation.

BACKGROUND

In August 1997, Kennesaw State University began an investigation of one of its professors, Paul Lapides, after a student accused him of sexual harassment. The university investigation produced no corroborating evidence to support the allegation and no action was taken against Lapides. Lapides alleges that as a result of the incident he became aware of letters fabricated by fellow faculty members containing defamatory statements about him and the sexual harassment accusations. He contends that those letters, which were disseminated to others on the faculty, are now part of his personnel file and they have interfered with his eligibility for various faculty positions and promotional opportunities.

Lapides sued the Board and the individual defendants under 42 U.S.C. § 1983 and the Georgia Tort Claims Act, O.C.G.A. § 50-21-23, in the Superior Court of Cobb County, Georgia, alleging that the actions of University officials deprived him of his right to due process of law as well as his liberty and property interests in practicing his profession which are guaranteed to him by the Fourteenth Amendment to the United States Constitution. The Georgia Attorney General filed a notice of removal to the Northern District of Georgia based on the court's original jurisdiction over the federal questions presented by the section 1983 claims. At the same time, he also filed a motion to dismiss the section 1983 claims under Federal Rule of Civil Procedure 12(b)(6) stating, among other reasons, the Board's Eleventh Amendment immunity from suit.

The district court denied the motion and held that the State, through its Attorney General, waived its Eleventh Amendment immunity by removing the case to federal court and invoking the jurisdiction of that court.

DISCUSSION

The Eleventh Amendment to the United States Constitution provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend XI. It is well established, though not expressly stated in the Constitution, that the Eleventh Amendment also prohibits a state from being sued by its own citizens. *Hans v. Louisiana*, 134 U.S. 1, 20-21, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

Although the Eleventh Amendment bars such suits, the Supreme Court has carved out exceptions. "First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment--an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999). Second, a state may consent to suit, but the test for determining whether a state has waived its Eleventh Amendment immunity is a stringent one. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). The United States Supreme Court stated that "a State will be deemed to have waived its immunity 'only where stated "by the most express language or by such an overwhelming implication from the text as [will] leave no room for any other reasonable construction." ' " Id. (quoting *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 53 L.Ed. 742 (1909))) (alteration in original). In fact, in *College Savings Bank*, the Court overruled the

constructive waiver doctrine of *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964). 526 U.S. at 680, 119 S.Ct. 1661.[1]

The test to determine whether a state official is authorized to waive the State's Eleventh Amendment immunity is equally stringent. "[A] waiver of Eleventh Amendment immunity by state officials must be explicitly authorized by the state 'in its Constitution, statutes and decisions.' " *Silver v. Baggiano*, 804 F.2d 1211, 1214 (11th Cir.1986) (quoting *Ford Motor Co. v. Dept. of Treas. of Ind.*, 323 U.S. 459, 467, 65 S.Ct. 347, 89 L.Ed. 389 (1945)). In addition, the Supreme Court, in Ford Motor Co., stated that such authority "is not to be presumed in the absence of clear language to the contrary." 323 U.S. at 468, 65 S.Ct. 347.

Several circuits have addressed the issue of the authority of a state's Attorney General to waive the State's immunity. E.g. *Santee Sioux Tribe of Neb. v. Nebraska*, 121 F.3d 427, 431-32 (8th Cir.1997) (holding that there was no showing that waiver was within the authority of Nebraska's Attorney General); *Dagnall v. Gegenheimer*, 645 F.2d 2, 3 (5th Cir.1981) (holding that the Attorney General of the state of Louisiana had no authority to waive the State's immunity). But cf. *McLaughlin v. Bd. of Trustees of State Colls. of Colo.*, 215 F.3d 1168, 1171 (10th Cir.2000) (holding that the state Attorney General waived the State's immunity). However, we have never considered

[1] The doctrine of constructive waiver permits abrogation of Eleventh Amendment sovereign immunity in cases where the State either: (1) acts as a market participant, i.e. in a manner typically related to wholly-private actors; or (2) performs some act that based on the surrounding circumstances would lead one to believe that the State has intended to waive its immunity. See *Parden*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233; *Coll. Sav. Bank*, 527 U.S. at 682-87, 119 S.Ct. 2219.

whether the Attorney General of Georgia has the authority to waive the State's immunity.

Turning to the text of Georgia's constitution and statutes, we find the following references enlightening as to when immunity is waived. The Georgia Constitution provides:

> The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.
>
> No waiver of sovereign immunity under this Paragraph shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution.

Ga. Const. Art. I, § II, ¶ IX (e)-(f).[2] Therefore, immunity in Georgia may be waived only through statute.

[2] The Georgia Code explicitly reaffirms the applicability of sovereign immunity to the Board of Regents. See O.C.G.A. § 20-3-36. However, with respect to the Georgia Tort Claims Act ("GTCA"), under which Lapides claims partially arise, the Georgia legislature has stated:

> The state waives its sovereign immunity only to the extent and in the manner provided in [the GTCA] and only with respect to actions brought in the courts of the State of Georgia. The State does not waive any immunity with respect to actions brought in the courts of the United States.

O.C.G.A. § 50-21-23(b). Therefore, immunity has been waived to the claims arising under the state tort law.

Section 45-15-3 of the Georgia Code sets forth the duties of the Attorney General. It provides that the Attorney General must "represent the state in all civil actions tried in any court." O.C.G.A. § 45-15-3(6). This is the only section which conceivably could be seen as a grant of authority to the Attorney General to waive immunity. However, it is not an unequivocal expression of authority. In fact, in light of *Ford Motor Company*, the grant of power to the Attorney General to defend suits on behalf of the State is not an express grant of authority to the Attorney General to proceed with the case in any way he deems appropriate; something more is required to constitute a grant of authority to waive immunity, particularly when the State strictly construes the powers of the official. 323 U.S. at 468-69, 65 S.Ct. 347; see also *Walker v. Ga. Ry. & Power Co.*, 146 Ga. 655, 92 S.E. 57, 58 (1917) (stating that "[t]he duties and powers of the attorney-general of this State are limited by the provisions of the Constitution and statutes...."); *Bryant v. State*, 164 Ga.App. 555, 296 S.E.2d 792, 794 (1982) (stating that a state official cannot perform acts not "within the scope of ... statutory and constitutional provisions."). Thus, the Attorney General of the State of Georgia lacked the statutory authority to waive the State's Eleventh Amendment immunity and the legislature has not authorized a waiver of immunity specifically in this context.

Nonetheless, our inquiry does not end there. We have held that an unequivocal expression in the Constitution, statutes, or decisions of the state is not the only way a state can waive its Eleventh Amendment immunity. In *In re Burke*, we stated, "in the absence of explicit consent by state statute or constitutional provision, a state may consent to a federal court's jurisdiction through its affirmative conduct." *In re Burke*, 146 F.3d 1313, 1318 (11th Cir.1998). Yet, this decision was necessarily a narrow one.

In re Burke involved the consideration of two cases in which the Department of Revenue of Georgia filed a proof of claim against debtors. Id. at 1315. Subsequently, the debtors filed an adversary action against Georgia. Id. In bankruptcy proceedings such as this, it is well established that he who invokes the jurisdiction of the bankruptcy court must abide by the consequences of that action. Id. at 1319. In fact, the Supreme Court has held that invoking the jurisdiction of a bankruptcy court can be deemed a waiver of immunity as can the intervention in a proceeding in which the government is not a party. *Gardner v. New Jersey*, 329 U.S. 565, 573-74, 67 S.Ct. 467, 91 L.Ed. 504 (1947) (holding that the state, when it invokes the jurisdiction of the bankruptcy court, must abide by the consequences of that decision and therefore waives its immunity); *Gunter v. A. Coast Line R. Co.*, 200 U.S. 273, 284, 26 S.Ct. 252, 50 L.Ed. 477 (1906) (holding that when a state voluntarily becomes a party to a cause, it cannot assert Eleventh Amendment immunity); *Clark v. Barnard*, 108 U.S. 436, 447, 2 S.Ct. 878, 27 L.Ed. 780 (1883) (holding that voluntary intervention constitutes a waiver of immunity).

In our discussion, we indicated the limited application of our holding in *In re Burke*, when we said, "We emphasize that our holding regarding the State's waiver of Eleventh Amendment immunity is quite narrow because the debtors seriously seek to recover only the costs and attorneys' fees incurred in enforcing the bankruptcy court's automatic stay and discharge injunction." 146 F.3d at 1319. Thus, we provided a holding circumscribed by the context of bankruptcy proceedings, in which the State waived its Eleventh Amendment immunity by filing a proof of claim in the bankruptcy proceedings. Id.

The fact that we did not cite *Silver* in our decision in *In re Burke* is also quite telling as to its scope. In *Silver*, we

discussed the authority of the Attorney General of Alabama to waive the State's immunity. 804 F.2d at 1214-15. Though not necessary to the ultimate disposition of the case because the parties conceded that the Attorney General did not possess the authority to waive immunity, we indicated our thoughts on whether removal of the case to federal court constituted a waiver of Eleventh Amendment immunity:

> It might be argued that the Eleventh Amendment immunity was waived by the removal of this case from state court to federal court. However, a waiver of Eleventh Amendment immunity by state officials must be explicitly authorized by the state "in its Constitution, statues and decisions...." Thus, removal by state officials of a suit containing state law claims to federal court does not amount to waiver of Eleventh Amendment immunity unless those state officials are authorized to waive such immunity.

Id. at 1214 (quoting *Ford Motor Co.*, 323 U.S. at 467, 65 S.Ct. 347) (citation omitted).

We clearly held that a state official must have the authority to waive the State's immunity under the Constitution, statutes, or decisions of the State. As we have already found that the Georgia Attorney General does not possess such authority, that should be the end of the discussion. Yet, Lapides argues that our holding in Silver is inconsistent with In re Burke and with subsequent indications from the Supreme Court as to what it would do in such a case. See *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 393-98, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) (Kennedy, J. concurring). More specifically, he argues, as the district court did, that requesting the jurisdiction of the federal courts is an affirmative act akin to the voluntary intervention into a suit by the State.

While we are also troubled by the seemingly inconsistent

positions of the State by both asserting that the federal courts have jurisdiction to obtain removal, while simultaneously arguing with equal force that the federal courts do not have authority to hear the claims because of Eleventh Amendment immunity, we do not believe that either *In re Burke* or *Schacht* is inconsistent with our pronouncements in *Silver*.[3]

In *Schacht*, Justice Kennedy theorizes in his concurrence that if the issue of state official removal of a case to federal court were to arise, he would not find the holding of *Ford Motor Co.* to be an "insuperable obstacle to adopting a rule of waiver in every case where the State, through its attorneys, consents to removal from the state court to the federal court." Id. at 397. His statements that "a different case may be presented when a State under no compulsion to appear in federal court voluntarily invokes its jurisdiction," Id. at 395, has been adopted by at least one circuit. See *McLaughlin*, 215 F.3d at 1170-72; *Sutton v. Utah State Sch. for the Deaf and Blind*, 173 F.3d 1226 (10th Cir.1999).

While Justice Kennedy's concurrence may provide some insight as to how he, at least, would come out on the issue in the future, we are presently bound by the actual holding of *Schacht*. In this analogous case, where state officials chose to remove a section 1983 claim to federal court, the Court was confronted with the issue of whether removal was appropriate in a case where the federal court lacked jurisdiction over some of the

[3] "Under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong." *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc). Moreover, "we are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court." *Fla. League of Professional Lobbyists v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996).

claims based on Eleventh Amendment immunity. Id. at 385. The Justices held that the presence of claims barred by the Eleventh Amendment "does not destroy removal jurisdiction that would otherwise exist." Id. at 386. They then went on to state that the proper action of the district court would be to hear only those claims that are not barred and to remand to state court the other claims. Id. at 392-93. The logic of the Court's opinion does not undercut our holding in *Silver* and in fact supports our holding in this case.

We also find some of the reasoning of *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140 (4th Cir.1997), persuasive on this issue. There, the Fourth Circuit distinguished between defending a suit and filing a proof of claim in a bankruptcy proceeding. Id. at 1149. The Fourth Circuit did not find waiver where the only action by the State in federal court was defense of a suit and no proof of claim was filed. Id. The court reasoned that waiver was necessary with regard to filing a proof of claim because it would be unfair to permit the state to file a proof of claim and, at the same time, allow them to "strip the defendant of valid defenses because they might be construed to be affirmative claims against the state." Id. at 1148. The panel, nonetheless, felt that absent the filing of a proof of claim and the authority of the Maryland Attorney General to waive immunity, such a waiver could not be implied. As such, cases in which the State files a proof of claim are distinguishable from other cases, for it is possible for states to gain an unfair advantage in those cases if they are also allowed to assert their sovereign immunity at the same time. Id.

The present case did not find its way into our courts because of a state initiated cause of action, rather Lapides filed suit and the State removed to theoretically take advantage of our superior knowledge of the federal questions involved in the

case.[4] This coupled with the fact that past cases have held that Eleventh Amendment immunity may be asserted at any point in a case, see *Fla. Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n. 18, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982) (stating that Eleventh Amendment immunity may be asserted for the first time on appeal); *Calderon v. Ashmus*, 523 U.S. 740, 745 n. 2, 118 S.Ct. 1694, 140 L.Ed.2d 970 (1998) (same), and may be raised by a court sua sponte, see *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 524, 525 n. 8, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), we find that our pronouncements in *Silver* stand.[5]

Therefore, we hold that the defendants did not waive their Eleventh Amendment immunity by removal of the case. The district court is instructed to hear only those non-barred claims over which it has jurisdiction and remand the others to state court. If no such non-barred federal questions exist, the whole case is to be remanded to state court.

REVERSED AND REMANDED.

[4] This is, in fact, what the State argues in its brief for this case. Therefore, we proceed based on their arguments and disregard the possibility that the assertion of sovereign immunity may in fact lead to a situation in which there are no claims over which the federal courts have jurisdiction.

[5] In *College Savings Bank*, the Supreme Court held that the voluntariness of waiver is destroyed when the state is forced to choose between refusing to waive immunity and the exclusion from a lawful activity. 527 U.S. at 687, 119 S.Ct. 2219. Therefore, it could be argued, as defendants in this case do, that waiver would be involuntary in a case in which the State is forced to choose between the forum of its choice and immunity. We would be reluctant to base any part of our holding on that ground, however, for it seems that both plaintiff and defendant are mutually excluded from the federal forum in that scenario and thus no strategic or other disadvantage is evident.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PAUL D. LAPIDES, Plaintiff,

CIVIL ACTION FILE

v.

NO. 1:00-CV-953-TWT

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al., Defendants.

ORDER

This case arises under 42 U.S.C. § 1983 alleging violations of due process, in addition to state law tort claims of libel and slander. Before the Court are Defendants' Motion to Dismiss [Doc. 2] and Plaintiff's Motion to Remand [Doc. 7]. For the reasons set forth below, the Court will grant in part and deny in part Defendants' Motion to Dismiss and deny Plaintiff's Motion to Remand.

I. BACKGROUND [1]

Plaintiff Paul D. Lapides is a Professor at Kennesaw State University. The Defendants are the Board of Regents of the University System of Georgia – the state entity responsible

[1] These background statements come from the Plaintiff's Complaint and are taken as true for purposes of these motions.

for Kennesaw State University – and two individual Defendants sued in their official and personal capacities. The individual Defendants are Dr. Edwin A. Rugg and Dr. Teresa J. Covin.[2] Both are supervisors of Mr. Lapides at Kennesaw State University. Dr. Rugg is Vice President for Academic Affairs and Dr. Covin chairs the Department of Management and Entrepreneurship in which Mr. Lapides teaches. Mr. Lapides alleges that the individual Defendants intentionally violated his constitutional right to due process of law by inserting false and misleading statements about him in his personnel file at Kennesaw State University.

Mr. Lapides has been employed as a professor at Kennesaw State University for almost seven years. Mr. Lapides alleges that in August of 1997, he received notice of a student complaint of sexual harassment filed against him. An investigation by the university produced no evidence to corroborate the allegation, and no action was taken against Mr. Lapides. Nevertheless, Mr. Lapides alleges that the investigation and subsequent procedures have defamed him, violated his right to due process of law, and violated his liberty and property interests in practicing his profession. Mr. Lapides alleges that Defendants' placement in his personnel file of allegedly defamatory material impedes his selection for various positions. Mr. Lapides alleges that Dr. Covin fabricated documents and disseminated them to others, including Dr. Rugg. He alleges that Dr. Rugg referenced the allegedly fabricated documents in a letter which is now part of Mr. Lapides' personnel records. As a due process violation, he alleges that Defendants did not timely produce a copy of the sexual harassment complaint as

[2] Plaintiff dismissed without prejudice his claims brought against Dr. Timothy Mescon, individually and in his official capacity as Dean of the Coles College of Business at Kennesaw State University. [Doc. 1, Exh. G].

required by university policy. Mr. Lapides also alleges that he was not allowed to respond to the allegations in the harassment complaint. Additionally, he alleges that he has received unspecified threats. Mr. Lapides also alleges that Defendants improperly failed to promote him or raise his salary, and that he has been subjected to a hostile work environment. He also alleges to have suffered from an intentional infliction of emotional distress. Finally, Mr. Lapides stated in his Complaint his intent to file a complaint with the EEOC for religious and gender discrimination and retaliation.

Mr. Lapides filed this case on March 9, 2000 in the Superior Court of Cobb County, Georgia. On April 13, 2000, Defendants filed their Answer. Within their Answer, the Defendants asserted the defense of Eleventh Amendment immunity from suit in federal court. Defendants filed contemporaneously with their Answer a Notice of Removal to this Court. Also on April 13, 2000, Defendants filed a Motion to Dismiss in this Court, largely on Eleventh Amendment grounds.

II. STANDARD OF REVIEW

A complaint should be dismissed under Rule 12(b)(6) only where it appears beyond doubt that no set of facts could support the plaintiffs claims for relief. Fed.R.Civ.P. 12(b)(6); *see Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); *Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construes them in the light most favorable to the plaintiff. *See Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 994-95 (11th Cir. 1983). Notice pleading is all that is required for a valid complaint. *See*

Lombard's Inc. v. Prince Mfg., Inc., 753 F.2d 974, 975 (11th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986). Under notice pleading, plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. *Id.*

III. DISCUSSION

A. MOTION TO REMAND

Mr. Lapides moves this Court to remand this case to the Superior Court of Cobb County, Georgia pursuant to 28 U.S.C. §1447(c). Mr. Lapides alleges first that Defendants waived their right to remove this case to federal court by filing an answer in state court. Second, Mr. Lapides alleges that Defendants waived their right to remove by claiming Eleventh Amendment immunity. Third, Mr. Lapides argues that it was improper for the Defendants to remove a case in which they contend all claims are barred from consideration by a federal court. As noted above, this case was filed in the Superior Court of Cobb County on March 9, 2000. Under Georgia law, Defendants had 30 days after the service of process to file their answer. *See* O.C.G.A. § 9-11-12. On the 30th day, Defendants filed in state court both their answer and notice of removal. It is undisputed that Defendants were not required to file the answer in state court because filing the notice of removal immediately stayed further action in the state court. Defendants took no other action in state court and did not include any counterclaims in their answer. Mr. Lapides contends that filing the answer when not required by state law constitutes a waiver of Defendants' right to remove.

Mr. Lapides fails to cite any case which supports his argument that the mere filing of an answer in state court waives a defendant's right to remove a case to federal court. The Eleventh Circuit has not addressed the issue. Other Circuit

Courts of Appeal, as well as several district courts in this circuit, however, have addressed the issue. Generally, these courts have held that the mere filing of a responsive pleading in state court, without more, does not constitute a waiver of a defendant's right to remove. *See Beighley v. Federal Deposit Ins. Corp.*, 868 F.2d 776, 782 (5th Cir. 1989) (holding the "right of removal is not lost by action in the state court short of proceeding to an adjudication on the merits."); *Haynes v. Gasoline Marketers, Inc.*, 184 F.R.D. 414 (M.D. Ala. 1999); *Hill v. State Farm Mut. Auto, Ins. Co.*, 72 F. Supp.2d 1353 (1999) (holding that filing a motion to dismiss in state court did not waive right to remove to federal court); *Estevez-Gonzalez v. Kraft, Inc.*, 606 F. Supp. 127 (S.D. Fla. 1985). Commentators agree with this approach: "A waiver of the statutory right to remove a case from a state to a federal court must be clear and unequivocal." Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction 3d, §3721. This Court agrees. Defendants' filing of their answer in state court on the same day they filed their notice of removal does not construe a clear and unequivocal indication of their intent to waive their right to removal. To the contrary, filing a notice of removal indicates their intent to exercise their right to remove.

Mr. Lapides' remaining arguments for remand merit only brief discussion. As a second ground for remanding, Mr. Lapides argues that the Defendants waived their right to remove by raising their Eleventh Amendment immunity in state court. As with his first argument, Mr. Lapides fails to cite any case supporting his contention that mentioning the Eleventh Amendment in a state court answer bars a defendant from removing a case to federal court. This argument is without merit. Rather than indicating a clear and unequivocal intent *to waive* their right to remove, Defendants' inclusion of the Eleventh Amendment defense in their answer demonstrates an

intention *to remove* because the Eleventh Amendment does not apply to state court proceedings. As a third argument, Mr. Lapides argues that it was improper for the Defendants to remove the case to a court which they contend is barred by the Eleventh Amendment from considering the case. Again, Mr. Lapides cites no authority for the proposition that raising an Eleventh Amendment immunity defense against some claims destroys a defendant's right to remove the whole case. Moreover, Mr. Lapides' argument ignores his claims against the individual defendants in their personal capacities. These claims are not barred by the Eleventh Amendment, and Defendants do not seek to raise an Eleventh Amendment defense with respect to these claims. Furthermore, the Supreme Court has stated that federal courts have jurisdiction to hear a removable case, even though some of the claims in the case may be barred by the Eleventh Amendment. *See Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998). Accordingly, Mr. Lapides' Motion to Remand is denied.

B. MOTION TO DISMISS

Defendants make six arguments for dismissing various claims from the Complaint. First, Defendants argue that the Court lacks subject matter jurisdiction to hear Mr. Lapides' Title VII claim because he has not filed his claim within 90 days of receipt of his "'right to sue" letter. Second, Defendants argue that the federal claims against the State, i.e. the Board of Regents and the individual defendants in their official capacities, are barred by the Eleventh Amendment. Third, and related to their second argument, Defendants argue that the state tort claims against the State must also be dismissed or severed and remanded because the State has not waived its Eleventh Amendment immunity from suit in federal court. Fourth,

Defendants argue that the § 1983 claims against Drs. Rugg and Covin are barred by qualified immunity. Fifth, Defendants argue that § 1983 will not support a claim based on vicarious liability. Finally, Defendants argue that Mr. Lapides has not stated a claim for violation of due process.

1. TITLE VII CLAIM.

Defendants' first argument is without merit. Defendants argue that Mr. Lapides has failed to meet the jurisdictional prerequisite of filing a Title VII claim within 90 days of receiving his right to sue letter from the EEOC. Mr. Lapides, however, has not yet brought a Title VII claim against the Defendants. The Complaint expressly states that Mr. Lapides has only filed a complaint with the EEOC, and stated his intent to add a Title VII claim at the appropriate time. [Doc. 1, Exh. A., ¶ 27]. This situation is distinguishable from the case on which Defendants rely. In *Perimeter Lighting Inc. v. Karlton*, 456 F. Supp. 355 (N.D. Ga. 1978), the plaintiff initiated its action not by filing suit but by presenting a motion for a preliminary injunction to the state court. On consideration, the judge signed an order enjoining the defendant from denying plaintiff access to leased lighting fixtures. When the judge signed the order, the complaint had not been filed with the clerk of the state court. At the hearing on the preliminary injunction, however, both the judge and counsel for the defendant were provided with a copy of the complaint in the case. A second complaint with different parties was then filed in the state court on the same day the defendant removed the case to federal court. United States District Judge O'Kelley allowed the removal because the "initial pleading" constituted a clear statement of the entire case which allowed the defendant to examine the basis for the action. *Id.*, at 358. No claims were raised in the complaint

that were not present in the initial pleading, i.e., the motion for a preliminary injunction, although new parties were named in the second complaint. Here, there has been no initial pleading for the Title VII claim. The pleading filed by Mr. Lapides only expresses his intention to later file a Title VII claim. Consequently, a clear statement of any Title VII claim does not exist. Thus, the motion to dismiss will be denied as to the purported Title VII claim.

2. ELEVENTH AMENDMENT IMMUNITY.

Defendants next argue that the Eleventh Amendment[3] bars Mr. Lapides' federal and state claims against the State. The Eleventh Amendment bars suit against a state or one of its agencies, departments or officials when the state is the real party in interest or when any monetary recovery would be paid from state funds. *See Wisconsin Dept. of Corrections*, 524 U.S. at 389; *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Despite its express language, the Supreme Court has construed the Eleventh Amendment jurisdictional bar to extend to federal suits against a non-consenting state "by her own citizens as well as citizens of another state." *Port Auth.Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990) (*quoting Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984)). Eleventh Amendment immunity can only be overcome through a waiver by the state or a valid congressional override. *See Wisconsin Dept. of Corrections*, 524 U.S. at 389. Neither party contends that

[3] The Eleventh Amendment provides: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

Congress has abrogated the State's immunity in this case. Mr. Lapides, however, argues that the State has waived its Eleventh Amendment immunity by removing the case to federal court.

As a preliminary matter, it is undisputed that the State can waive its Eleventh Amendment defense.[4] *Wisconsin Dept. of Corrections*, 524 U.S. at 389 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)). A waiver must be unequivocal to be valid. "In the absence of an unequivocal waiver specifically applicable to federal-court jurisdiction, we decline to find that [the State] has waived its constitutional immunity." *Atascadero State Hosp. v. Scanlon*, 473 U.S. at 241. Thus, the question before the Court is whether the State's act of removing a case to federal court constitutes an "unequivocal wavier" of its Eleventh Amendment immunity for a particular claim.[5] The Eleventh Circuit has not yet addressed the issue. Several other circuits, however, have held that when a state voluntarily invokes the jurisdiction of the federal court, the state cannot later complain that it does not want to be in federal court

[4] It is important to note that a state can create a limited waiver of its Eleventh Amendment immunity by consenting to suit in its own state courts without waiving its Eleventh Amendment immunity from suit in federal courts. *See Port Authority Trans-Hudson Corp.*, 495 U.S. at 305. Thus, a state may waive its common law sovereign immunity under state law, without waiving its Eleventh Amendment immunity under federal law. These two concepts of immunity are distinct. "Each ultimately rests upon separate, albeit related, footing--common law sovereign immunity is determined by state law and Eleventh Amendment immunity is determined under federal standards." *In re Allied-Signal, Inc.*, 919 F.2d 277, 281 (1990); see also Wright & Miller, Federal Practice and Procedure, § 3524 at pp. 213-14.

[5] The Supreme Court has recently written that "[a] federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 121.

after all. *See Sutton v. Utah State Sch. For the Deaf and Blind*, 173 F.3d 1226 (10th Cir. 1999) (holding that the state, by removing the case to federal court, unequivocally waived its immunity); *Hill v. Blind Indus. and Serv. of Maryland*, 179 F.3d 754 (9th Cir. 1999) (holding that the state defendant waived its Eleventh Amendment immunity by waiting until trial to assert it); *Dekalb County Div. of Family and Children Svcs. v. Platter (In re Platter)*, 140 F.3d 676, 680 (7th Cir. 1998) (holding that when a state voluntarily enters the federal forum by filing a claim, "it cannot run back to seek Eleventh Amendment protection when it does not like the result"); *Newfield House, Inc. v. Massachusetts Dept of Pub. Welfare*, 651 F.2d 32, 36 n.3 (11th Cir. 1981) (holding that state waived immunity by removing case to federal court). This Court concurs with the reasoning of these courts. Where a state facing suit in a state court purposefully seeks a federal forum, an unequivocal intent to waive immunity is clear. *See Sutton*, 173 F.3d at 1234.

Further support for this conclusion appears in early cases holding that a State's voluntary intervention in a federal case to assert its own claim amounted to a waiver of the Eleventh Amendment. *Clark v. Barnard*, 108 U.S. 436, 447-448 (1883); *Employees of Dept. of Public Health and Welfare of Mo. v. Dept. of Public Health and Welfare of Mo.*, 411 U.S. 279, 294, n. 10 (1973) (Marshall, J., concurring in result) (citing *Clark v. Barnard* with approval); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276 (1959) (same); *Missouri v. Fiske*, 290 U.S. 18, 24-25 (1933) (same). Waiver has also been found when a state voluntarily files a claim against a fund that is under the federal court's jurisdiction, such as a bankruptcy case. *See Georgia Dept. of Revenue v. Burke (In re Burke)*, 146 F.3d 1313, 1319-20 (11th Cir. 1998) (holding that by filing proofs of claim in bankruptcy case, state waived immunity and became subject to liability for violation of automatic stay and

enforcement of discharge injunction), cert. denied, --- U.S. ---, 119 S.Ct. 2410, 144 L.Ed.2d 808 (1999); *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947).

In a recent concurrence, Justice Kennedy indicated his opinion that removal waives a state's Eleventh Amendment immunity. In *Wisconsin Dept. of Corrections*, *supra*, the State consented to removal but then raised an Eleventh Amendment objection to the jurisdiction of the United States District Court over the claim against it. *Id.* Justice Kennedy noted that "[t]his is the situation in which law usually says a party must accept the consequences of its own acts." *Id.* A simple rule would hold that once a state consents to removal, it waives its Eleventh Amendment immunity for that case. The rub in this appealingly simple logic appears in the great latitude afforded the states in raising the immunity. As Justice Kennedy pointed out, the Eleventh Amendment bar may be asserted for the first time on appeal when a state is initially sued in federal court. *Id.* Thus, a state sued in federal court does not waive its immunity by appearing and defending on the merits.

The situation before this Court is different. The distinction, in this Court's opinion, justifies adopting the clear and unequivocal rule. As Justice Kennedy wrote, "[e]ven if appearing in federal court and defending on the merits is not sufficient to constitute a waiver, a different case may be presented when a State under no compulsion to appear in federal court voluntarily invokes its jurisdiction." *Id.* at 395. Here, Mr. Lapides chose to sue the State of Georgia in state court. The State then directly invoked the jurisdiction of the United States District Court while simultaneously claiming immunity from the District Court's jurisdiction. Sanctioning this action would be fundamentally unfair. It would allow the state to avoid being sued anywhere in spite of its limited waiver of sovereign inununity; or it could first litigate on the merits but then assert

its immunity if it lost, thus allowing the state to raise offensively the defensive shield of Eleventh Amendment immunity.

The state should decide if it wants federal jurisdiction or not. "Since a state which is made a defendant to a state-court action is under no compulsion to appear in federal court and, like any other defendant, has the unilateral right to block removal of the case, any appearance the state makes in federal court may well be regarded as voluntary in the same manner as the appearances which gave rise to the waivers in *Clark* and *Gardner*." *Wisconsin Dept. of Corrections*, 524 U.S. at 395-96 (Kennedy, J., concurring); but see *Watkins v. California Dept. of Corrections*, 100 F. Supp.2d 1227 (finding that the state did not waive immunity from suit by removing action). "[W]here a state voluntarily becomes a party to a cause, and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment." *Gunter v. Atlantic Coast Line R.Co.*, 200 U.S. 273, 284 (1906). The Court is persuaded by Justice Kennedy's reasoning that states waive their Eleventh Amendment immunity in a particular case by directly involving the jurisdiction of the federal courts.

The Court also believes that the Attorney General, as the State's counsel in this case, has the authority to waive the state's Eleventh Amendment immunity by and through his representation of the State irrespective of any express grant of authority to do so. *See McLaughlin v. Board of Trustees of State Colleges of Colorado*, 215 F.3d 1168,1170 (10th Cir. 2000). Justice Kennedy also addressed this issue: whether a waiver can be found in the absence of a state law expressly authorizing the state's attorney to waive the Eleventh Amendment on its behalf. He wrote that

> the absence of specific authorization...is not an insuperable obstacle to adopting a rule of waiver in

> every case where the state, through its attorneys, consents to removal from the state court to the federal court. If the states know or have reason to expect that removal will constitute a waiver, then it is easy enough to presume that an attorney authorized to represent the state can bind it to the jurisdiction of the federal court (for Eleventh Amendment purposes) by the consent to removal.

Schacht, 524 U.S. at 397. Therefore, Defendants' Motion to Dismiss the federal claims against the State on Eleventh Amendment grounds will be denied. The motion will also be denied as to the state tort claims against the State.

3. 42 U.S.C. § 1983 AND DUE PROCESS

In addition to the Eleventh Amendment, Defendants raise other arguments against Mr. Lapides' § 1983 claims. He alleges Defendants violated his rights to due process of law. With regard to these claims, the Defendants raise the defense of qualified immunity. A proper analysis of the claims against Drs. Rugg and Covin requires an understanding of the distinction between official-capacity actions and personal-capacity actions, sometimes referred to as individual-capacity actions. Personal-capacity suits seek to impose personal liability upon a government official for actions taken under color of state law. *Kentucky v. Graham*, 473 U.S. 159,165-167 (1985). Official-capacity suits differ in that the real party in interest is the entity as long as the government entity receives notice and an opportunity to respond. *Yeldell v. Cooper Green-Hosp.*, 956 F.2d 1056, 1060 (11th Cir. 1992). "Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on damages judgment in an official-capacity suit must look to the government entity itself." *Kentucky*, 473

U.S. at 165-167.

On the merits, to establish personal liability in a § 1983 suit, one must show only that the official, acting under color of state law, caused the deprivation of a federal right. *Id.* An official capacity action requires more. "[A] governmental entity is liable under § 1983 only when the entity itself is a 'moving force' behind the deprivation. Thus, in an official-capacity suit the entity's 'policy or custom' must have played a part in the violation of federal law." *Id. See also Yeldell*, 956 F.2d. 1056. Considering defenses to liability, "an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law." *Id.* These defenses are unavailable in an official capacity suit. *Id.* Only sovereign immunity can be claimed in an official capacity action "that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Id.*

The Court will first discuss the personal capacity claims against Drs. Rugg and Covin. These individual Defendants, in their personal capacities, are entitled to qualified immunity if the law with respect to their actions was unclear at the time the cause of action arose. *Clark v. Evans*, 840 F.2d 876, 879 (11th Cir. 1988). "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known... If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1983). The existence of Supreme Court cases or cases from this circuit recognizing a right helps determine whether the right is clearly established to a reasonably competent official. *Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993).

Mr. Lapides alleges that Drs. Rugg and Covin caused improper and defamatory material to be filed in his personnel record. He alleges that their conduct was "libelous, slanderous and defamatory" in statements and writings. [Doc. 1, Exh. A, Complaint ¶ 1]. As to Dr. Covin specifically, the department chair, Mr. Lapides alleges that Covin fabricated defamatory documents concerning Mr. Lapides and disseminated them to others, including Dr. Rugg. As for Dr. Rugg, the Vice President of Academic Affairs, Mr. Lapides alleges Rugg referenced the false allegations in his letter to Mr. Lapides "after [Rugg] knew or should have known of its origins." [Complaint, ¶ 11]. Mr. Lapides alleges that Dr. Rugg placed the letter and alleged libelous documents in Mr. Lapides' personnel records at Kennesaw State University. Mr. Lapides also alleges that Drs. Rugg and/or Covin disseminated "defamatory statements to others within the academic community who had no right to receive such information..." [Complaint, ¶ 13]. He alleges that both Drs. Rugg and Covin acted intentionally and willfully to harm him. Accepting these allegations as being true, the Plaintiff has not shown a violation of a clearly established constitutional right. It is unconstitutional for a state to defame a citizen without providing proper procedural due process. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). The Eleventh Circuit has also held that the placement of "stigmatizing information placed into the public record by a state entity, pursuant to a state statute or otherwise, constitutes sufficient publication to implicate the liberty interest under the due process clause of the Fourteenth Amendment to the United States Constitution." *Buxton v. City of Plant City, Florida*, 871 F.2d 1037, 1046 (11th Cir.1989). Contrary to Plaintiff's argument, that does not end the inquiry. Although Plaintiff's liberty interest may have been clearly established, Plaintiff must show that it was clearly established that he was entitled to more

protection of that interest than he received. In this case, after an investigation, the original complaint of sexual harassment was resolved in favor of Mr. Lapides. Thereafter, references to the complaint were made in response to the various complaints and grievances made by Mr. Lapides. Plaintiff has not cited any case clearly holding that university officials violate a professor's constitutional rights by investigating a complaint of sexual harassment and doing nothing further in terms of formal or informal hearings after resolving it in favor of the professor. The Plaintiff may not rely upon legal truisms. "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993). There is no such bright line case law in this case. Therefore, Defendants' Motion to Dismiss is granted as to the § 1983 claims against Drs. Rugg and Covin in their personal capacities.

The official capacity claims against Drs. Rugg and Covin will be addressed within the § 1983 claim against the State. Suits brought under § 1983 against individuals in their official capacities are equivalent to bringing suit against the entity. *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991) (*citing Kentucky v. Graham*, 473 U.S. 159, 165 (1985)). Defendants did not discuss in their brief the § 1983 claims against the State. "[A] governmental entity is liable under § 1983 only when the entity itself is a 'moving force' behind the deprivation. Thus, in an official-capacity suit the entity's 'policy or custom' must have played a part in the violation of federal law." *Id*; *See also Yeldell*, 956 F.2d 1056. At this point, the Court cannot say as a matter of law that Mr. Lapides could prove no set of facts by which to establish an unconstitutional policy or custom by the Board of Regents through Kennesaw State University. Accordingly, Defendants' Motion to Dismiss shall be denied as to the § 1983 claims against the State, i.e. the

Board of Regents and against Drs. Rugg and Covin in their official capacities. The Court will not address Defendants' arguments regarding vicarious liability under § 1983 as Mr. Lapides does not base his claim on that theory of recovery.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss [Doc. 2] is hereby GRANTED IN PART AND DENIED IN PART. Plaintiff's Motion to Remand [Doc. 7] is hereby DENIED.

SO ORDERED, this 8 day of September, 2000.

THOMAS W. THRASH, JR.
United States District Judge

UNITED STATES CODE ANNOTATED
TITLE 28.
JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 89--DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its

discretion, may remand all matters in which State law predominates.

. . . .

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

UNITED STATES CODE ANNOTATED

TITLE 28.

JUDICIARY AND JUDICIAL PROCEDURE

PART IV--JURISDICTION AND VENUE

CHAPTER 89--DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

UNITED STATES CODE ANNOTATED

TITLE 28.

JUDICIARY AND JUDICIAL PROCEDURE

PART IV--JURISDICTION AND VENUE

CHAPTER 89--DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper

from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

. . . .

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

. . . .

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO.
1-00-CV-0953

PAUL D. LAPIDES, Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; EDWIN A RUGG, personally and in his capacity as Vice-President for Academic Affairs at Kennesaw State University; TIMOTHY MESCON, individually and in his capacity as Dean of Coles College of Business at Kennesaw State University; and TERESA J. COVIN, a/k/a TERESA JOYCE, individually and in her capacity as Chair of the Department of Management & Entrepreneurship at Kennesaw State University Defendants.

NOTICE OF REMOVAL

To: The Judges of the United States District Court for the Northern District of Georgia, Atlanta Division

COME NOW Defendants in the above-styled matter and pursuant to 28 U.S.C. §§ 1441 and 1446, and within the time prescribed by law, file this Notice of Removal. The Defendants

file this notice subject to and without waiving any defenses available to the Defendants under state and federal law. The Defendants respectfully show the following:

1.

Plaintiff, Paul D. Lapides, has brought a civil action against the Defendants named above in the Superior Court of Cobb County, said action being designated as Paul D. Lapides v. Board of Regents of the University System of Georgia, et al., Civil Action No. 00-1-01880-24. Plaintiff seeks to recover damages from the Defendants pursuant to 42 U.S.C. § 1983 for alleged violations of the Plaintiff's Civil Rights under the United States Constitution and under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000(e), et seq.)

2.

This action is a civil action brought pursuant to 42 U.S.C. § 1983 and under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000(e), et seq.). Plaintiff's causes of action present federal questions over which this Court has original subject matter jurisdiction under the provisions of 28 U.S.C. § 1331, and, accordingly, is one which may be removed to this Court pursuant to the provisions of 28 U.S.C. § 1441(b) and 1443. The Defendants attach hereto a copy of the Complaint filed in the Superior Court of Cobb County, Georgia, on or about March 9, 2000 (Exhibit "A").

. . . .

WHEREFORE, The Defendants move that this Notice of Removal be filed, and that said action be removed to and proceed in this Court, and that no further proceedings be had in

in the Superior Court of Cobb County, State of Georgia.

This 13 day of April, 2000.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

KATHLEEN M. PACIOUS 558555
Deputy Attorney General

__/s/_____
LORETTA L. PINKSTON 580385
Senior Assistant Attorney General

__/s/_____
DEVON ORLAND 554301
Assistant Attorney General

__/s/_____
RALPH W. ELLIS 295840
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO.
1-00-CV-0953

PAUL D. LAPIDES, Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; EDWIN A RUGG, personally and in his capacity as Vice-President for Academic Affairs at Kennesaw State University; TIMOTHY MESCON, individually and in his capacity as Dean of Coles College of Business at Kennesaw State University; and TERESA J. COVIN, a/k/a TERESA JOYCE, individually and in her capacity as Chair of the Department of Management & Entrepreneurship at Kennesaw State University Defendants.

DEFENDANTS' MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

COME NOW Defendants, Board of Regents of the University System of Georgia, Edwin A. Rugg, Timothy Mescon, and Teresa J. Covin, and within the time permitted by

law, make and file this Motion to Dismiss pursuant to Federal Rules 12(b)(1) and 12(b)(6). This Court lacks subject matter jurisdiction on this action based on the following: (1) Plaintiffs' Title VII claims are barred because the Plaintiff has failed to establish that Plaintiff received a "right to sue" letter from the Equal Employment Opportunity Commission and filed this action within ninety days of that receipt.

Defendants further move that the Court dismiss Plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that:

(1) Plaintiff has failed to state a claim for which relief can be granted.

(2) Defendants have Eleventh Amendment immunity from suit.

(3) Defendants have qualified immunity.

(3) [sic] Defendants are protected by sovereign immunity.

For these reasons, Defendants respectfully request that Plaintiff's Complaint be dismissed in its entirety.

This 13 day of April, 2000.

Respectfully submitted,

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No. 01-298

Supreme Court, U.S.
FILED
SEP 25 2001
CLERK

In The

Supreme Court of the United States

PAUL LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

WHETHER THE STATE'S ACTION IN REMOVING A CASE TO FEDERAL COURT, SEEKING A DECISION ON THE MERITS AS TO SOME OF THE CLAIMS WHILE ASSERTING ITS ELEVENTH AMENDMENT IMMUNITY AS TO OTHER CLAIMS, CONSTITUTES A KNOWING AND UNEQUIVOCAL WAIVER OF ITS IMMUNITY.

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STATEMENT OF THE CASE

Petitioner glosses over several critical facts. At the time this case was removed to federal court there were federal claims against the individual defendants that were not barred by the Eleventh Amendment. Respondents removed the case in order to have these claims decided in federal court and moved to dismiss these claims under the doctrine of qualified immunity. The district court did in fact, dismiss these claims and Petitioner did not appeal this decision. Moreover, as to the barred claims, Petitioner minimizes the fact that Respondents expressly reserved their rights under the Eleventh Amendment **at the same time** as they removed the case to federal court. Finally, Petitioner omitted the fact that Respondents consistently maintained the position that the State law claims could be remanded to state court while the district court resolved the federal questions presented for review. A more balanced statement of the case is set out below.

Petitioner filed the instant action in the Superior Court of Cobb County, Georgia, seeking damages against the Board of Regents of the University System of Georgia and two state employees, Teresa Covin and Edwin Rugg, in both their individual and official capacities. Petitioner asserted federal claims under 42 U.S.C. § 1983, as well as claims under state tort law. Petitioner did not seek injunctive relief. Respondents answered in the Superior Court of Cobb County raising several defenses including the Eleventh Amendment to the United States Constitution. On the same day, Respondents removed the case to federal court based upon the federal court's original jurisdiction over the § 1983 claims.

In federal court, the Respondents filed a motion to dismiss all claims, or in the alternative, dismiss the federal claims and remand the barred state claims. In particular the state defendants asserted that: (1) the federal claims against the individual Respondents in their individual capacities are barred by the doctrine of qualified immunity; (2) the federal claims against the Board of Regents and the named Respondents in their official capacities are barred by the Eleventh Amendment; (3) neither of these defendants are considered "persons" under § 1983; and (4) the State law claims against all of the Respondents are barred by the Eleventh Amendment and should be dismissed or remanded back to state court for adjudication.

The district court found that the Respondents in their individual capacities are entitled to qualified immunity and dismissed those claims. As to the Board of Regents and the individual Respondents in their official capacities, the district court held that by removing the case to federal court, the Respondents waived their Eleventh Amendment immunity and are now subject to suit in a federal forum on both the state and federal claims.

The Eleventh Circuit reversed the district court as to the finding of waiver, ruling that the State had not exercised a knowing and unequivocal waiver of its Eleventh Amendment immunity. The Circuit Court further found that the Attorney General for the State of Georgia does not have the authority to waive the State's Eleventh Amendment immunity under the Georgia Constitution. It is from these rulings that Petitioner seeks certiorari.

SUMMARY OF THE ARGUMENT

This case is not suitable for the writ of certiorari for several reasons. First and foremost, Petitioner's characterization of the split in the Circuits is exaggerated. In order to create the appearance of a "profound dissonance in the decisions of the courts of appeal" (Pet. Brief p. 6), Petitioner lumps together a variety of cases that have significantly different facts and Eleventh Amendment issues from the case at bar. Unlike most of the cases cited by Petitioner, the Defendants have not asserted claims for affirmative relief, but seek only dismissal of all claims or alternatively dismissal of some and remand of others. Even if there is a split in the circuits, the only circuit that has decided contrary to the Eleventh is the Tenth Circuit; thus the split is not well developed. Similarly, the narrow opinion of the Court below was necessarily dependent on State law and has limited application. In looking for a conflict, Petitioner has unnecessarily broadened the scope of the decision below.

In addition to the fact that this case does not present a well-developed split in the circuits, it is not suitable for certiorari because the decision of the Eleventh Circuit is consistent with current Supreme Court precedent. Petitioner improperly attempts to reincarnate the principle of constructive waiver which this Court has discarded. Finally, Petitioner has not been harmed by the State's act in removing this case, whereas the State would be in a more vulnerable position had the decision of the district court been upheld. Therefore, this Court should decline certiorari in this case.

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER HAS EXAGGERATED THE CONFLICT AMONG THE CIRCUITS.

A. THE MAJORITY OF THE CASES CITED BY PETITIONER ADDRESS DIFFERENT ISSUES FROM THE CASE AT BAR.

Petitioner relies on numerous cases to argue that there is a split in the circuits. The majority of these cases significantly differ from the case at bar because they involve situations where the State voluntarily asserted claims for damages or other relief in federal court, or else the state consented to particular actions or orders of the federal court without reserving its Eleventh Amendment rights.

For example, Petitioner cites several cases where the various circuits have followed this Court's decision in *Gardner v. New Jersey*, 329 U.S. 565 (1947), and determined that the State waived its immunity by filing a proof of claim in a bankruptcy proceeding. *See In re Burke*, 146 F.3d 1313 (11th Cir. 1999); *In re Creative Goldsmiths of Washington, D.C.*, 119 F.3d 1140 (4th Cir. 1997); *In re Lazar*, 237 F.3d 967 (9th Cir. 2001); *In re Platter*, 140 F.3d 676 (7th Cir. 1998); *In re Fifth Ave. Assocs.*, 963 F.2d 502 (2nd Cir. 1992). The Court of Appeals below properly distinguishes these cases from the case at bar. (Pet. App. 6a-7a).

Similarly, Petitioner also inappropriately relies on several other cases to argue that there is a split in the circuits, because these cases involve situations not present in this case. For example, in one circuit a waiver is

found where the state files a counter-claim.[1] In that situation, unlike the removal situation, the state seeks affirmative relief from the federal court. And, as was correctly noted in this case by the Court of Appeals, "[t]he present case did not find its way into our courts because of a state initiated cause of action, rather Lapides filed suit and the state removed to theoretically take advantage of our superior knowledge of the federal questions involved in the case." (Pet. App. 10a).

Finally, in another line of cases, cited by Petitioner to show waiver by litigation conduct, the State submitted to a consent order or consented to court ordered relief without appealing, or, similarly, waited exceedingly late in the proceedings to assert their immunity.[2] However, this issue of the timeliness of the State's assertion of its immunity is not present in this case. Here, the State raised its Eleventh Amendment immunity in its answer and in its motion to dismiss, both of which were filed on the same day as the notice of removal.

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[1] *Howard Company v. Puerto Rico Aqueduct Sewer Authority*, 744 F.2d 880 (1st Cir. 1984); *Newfield House v. Massachusetts Department of Public Welfare*, 651 F.2d 32 (1st Cir. 1981).

[2] *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754 (9th Cir. 1999); *See also Garrity v. Sununu*, 752 F.2d 727 (1st Cir. 1984) (the state submitted to a consent order on issues of State law and raised the Eleventh Amendment for the first time when addressing attorney's fees on appeal); *Hawkins v. Finnel*, 964 F.2d 853 (8th Cir. 1992); *Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974); *Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware*, 12 F.3d 406 (3rd Cir. 1993) (state consented to comply with court ordered relief without appealing).

The only cases cited by Petitioner which establish a conflict with the Eleventh Circuit's decision are those out of the Tenth Circuit Court of Appeals.[3] *McLaughlin v. Board of Trustees of State Colleges of Colorado*, 215 F.3d 1168 (10th Cir. 2000); *Sutton v. Utah State Sch. For the Deaf and Blind*, 173 F.3d 1226 (10th Cir. 1999). Yet these cases rely on their own unique precedent and at best establish a one-circuit conflict. *Sutton*, 173 F.3d at 1234, 1235, *citing Gallager v. Continental Ins. Co.*, 502 F.2d 827 (10th Cir. 1974). The State in *Sutton* was arguably on notice that its consent to removal would be deemed by the Tenth Circuit to constitute a consent to suit.[4] The State in the present case properly relied on Eleventh Circuit precedent which did not find waiver by removal and thus would not have been on notice. *Silver v. Baggiano*, 804 F.2d 1211 (11th Cir. 1986).

B. THE DECISION OF THE ELEVENTH CIRCUIT IS NECESSARILY BASED UPON THE POWERS GRANTED TO THE ATTORNEY GENERAL UNDER THE LAW OF GEORGIA AND ON ELEVENTH CIRCUIT PRECEDENT.

In this case, the Eleventh Circuit analyzed the Georgia Attorney General's authority to waive the State's immunity by removal. (Pet. App. 6a). In determining that

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[3] Petitioner also correctly states that *Gwinn Area Community Schools v. Michigan*, 741 F.2d 840 (6th Cir. 1984) and *Estate of Porter ex rel. Nelson v. Illinois*, 36 F.3d 684 (7th Cir. 1994) provide support for the Eleventh Circuit's decision.

[4] This would meet at least one of Justice Kennedy's concerns expressed in *Wisconsin v. Schacht*, 524 U.S. 381, 383 (1998).

Georgia's Attorney General lacked the authority to waive the State's Eleventh Amendment immunity, the court relied on the Georgia Constitution as well as Georgia's statutory and case law. *Id.* The issue of an attorney general's authority to waive should be decided on a state-by-state basis. *Ford Motor Company v. Department of the Treasury of Indiana*, 323 U.S. 459 (1945).[5] *See also Magnolia Venture Capitol v. Prudential Securities, Inc.*, 151 F.3d 439 (5th Cir. 1998); *California Mother Infant Program v. California Department of Corrections*, 41 F. Supp. 90 (1999).

Further, there are several qualifications to the possibility of finding a waiver. *Wisconsin v. Schacht*, 524 U.S. 381, 393 (1998) (J. Kennedy concurring). Included within those is an exploration of the law of the state and the authority of the official executing the removal, combined with the knowledge of the state that removal could constitute a waiver. The decision in the case at bar thus has little application outside of Georgia.

C. IN LOOKING FOR A CONFLICT, PETITIONER HAS UNNECESSARILY BROADENED THE SCOPE OF THE DECISION BELOW.

The Petitioner has posed an issue for review that is far broader than the issue decided by the courts below. The Eleventh Circuit issued a narrow ruling that the

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[5] It is doubtful that the type of implied waiver doctrine contemplated in *Ford Motor Co.* remains viable today. However, there is no reason to believe that the portion of the opinion that addresses the attorney general's authority to waive the State's Eleventh Amendment immunity is invalid.

Attorney General for the State of Georgia does not have the authority to waive the State of Georgia's Eleventh Amendment immunity by removing a case to federal court. (Pet. App. 1a-11a).

Petitioner argues that this case could resolve issues that have "bedeviled its Eleventh Amendment jurisprudence for many years." (Pet. Brief p. 6). Petitioner argues that there is confusion in the circuits as to whether a waiver exists when a state files a counterclaim, a proof of claim or defends on the merits of a claim which could be barred by the Eleventh Amendment.[6] Petitioner also propounds that the issues of whether the Eleventh Amendment constitutes personal or subject matter jurisdiction could also be addressed if this Court were to grant certiorari to review this case. These issues go beyond the confines of the Eleventh Circuit's narrow opinion. Petitioner would have this Court make this case a springboard for the resolution of constitutional issues far broader than those considered below. To the extent that this Court desires to visit those issues, Respondents respectfully submit that this is not the appropriate case.

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[6] *See* footnotes 1 and 2; *See also McClendon v. Georgia Department of Community Health*, No. 00-15005 (11th Cir. August 17, 2001).

II. PETITIONER ATTEMPTS TO CARVE OUT A NEW AND UNJUSTIFIED EXCEPTION TO ELEVENTH AMENDMENT IMMUNITY.

A. THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH SUPREME COURT PRECEDENT.

The Eleventh Circuit opinion is consistent with recent decisions of this Court that waiver of Eleventh Amendment immunity cannot be "implied," but must be "express and unequivocal." *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). Yet, in seeking review of this case, Petitioner urges the Court to carve out a new and expansive waiver doctrine that is not justified by precedent or equity. Petitioner's theory of finding waiver in the face of an express invocation by the State of its immunity is akin to the "constructive waiver" doctrine which this Court has already discredited. *Id.* Petitioner is asking that an implied waiver be found, in violation of the clear requirement that a waiver must be express and unequivocal. *Id.*

B. ALLOWING THE STATE TO ASSERT IMMUNITY AFTER REMOVAL IS NOT UNFAIR TO PETITIONER.

Petitioner seeks to justify his expansive theory on the alleged unfairness of allowing the State to assert immunity after removal. (Pet. App. 14). Yet this argument does not bear up under inspection.

First, at the time the case was removed, there were non-barred federal claims to be decided by the federal court, prompting the Respondents to properly ask the

federal court to determine if they were entitled to qualified immunity. Second, Petitioner's claims against the Agency and the individuals in their official capacity would not have been viable even if they remained in state court because they are not "people" within the meaning of 42 U.S.C. § 1983, *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), and because federal causes of action cannot be pursued against the State in the State's courts unless allowed by the State's constitution or specific provisions of the federal statute. *Alden v. Maine*, 527 U.S. 706 (1999). Lastly, as to Petitioner's tort claims under State law, the Board's motion was made in the alternative. The Board argued that the district court did not have jurisdiction over the State law claims, so they should either be dismissed or remanded back to the state court for adjudication. Thus, with the exception of having the non-barred federal claims decided by a federal court instead of by a state court, Petitioner was in essentially the same substantive position he would have been had the case not been removed. If the decision of the district court were to stand, however, Respondents would be in a more vulnerable position and this should not be the price of admission into federal court. This being the case, Petitioner's request for an expansion of the waiver doctrine is unjustified.

CONCLUSION

WHEREFORE, based on the foregoing, Respondents pray that this Court deny the instant Petition for Writ of Certiorari.

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No. 01-298

DEC 20 2001

In the Supreme Court of the United States

PAUL D. LAPIDES, PETITIONER

v.

BOARD OF REGENTS OF UNIVERSITY OF GEORGIA SYSTEM, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a State that voluntarily removes a case to federal court waives its Eleventh Amendment forum immunity when state law does not expressly authorize the removing official to consent to suit.

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The question presented in this case is whether a State that voluntarily removes a case to federal court waives its Eleventh Amendment forum immunity when state law does not expressly authorize the removing official to consent to suit. The United States has a substantial interest in the resolution of that question. Federal law conditions a State's access to certain federal programs and benefits on the State's waiver of its immunity from suit in federal court. *E.g.* 42 U.S.C. 2000d-7 (States that receive federal financial assistance waive immunity from suit to enforce nondiscrimination requirements); 11 U.S.C. 106(b) (States that file proof of claim in bankruptcy waive immunity from suit with

respect to claims arising from the same transaction or occurrence); 47 U.S.C. 252(e)(6) (Supp. V 1999) (States that elect to assume regulatory authority under the Telecommunications Act of 1996 waive immunity from suit to review state commission actions). In addition, the United States possesses a distinct immunity from suit, except insofar as Congress expressly waives that immunity. See, *e.g.*, *Lane* v. *Pena*, 518 U.S. 187, 192 (1996). The United States therefore has a substantial interest in the standards for determining whether a State has waived its immunity from suit.

STATEMENT

1. Petitioner is a professor at Kennesaw State University (KSU), a state institution governed by the Board of Regents of the University of Georgia. Pet. App. 2a. In 1997, a KSU student charged petitioner with sexual harassment. *Ibid.* Although the charges were not proven, KSU officials allegedly placed information relating to the charges in petitioner's personnel file, which adversely affected his chances of obtaining other university positions. *Ibid.* Petitioner filed suit in the Superior Court of Cobb County Georgia against the Board of Regents and the responsible KSU officials (respondents), alleging that respondents' actions deprived him of due process of law in violation of the Fourteenth Amendment. *Ibid.* Petitioner also claimed that respondents committed the common law torts of libel and slander. *Ibid.* Petitioner sought compensatory and punitive damages under 42 U.S.C. 1983 (Supp. V 1999) and the Georgia Torts Claims Act, Ga. Code Ann. § 50-21-23 (1998). *Ibid.*

Pursuant to 28 U.S.C. 1441, respondents removed the case to the United States District Court for the Northern District of Georgia, and simultaneously moved to

dismiss petitioner's complaint. Pet. App. 2a. Respondents argued that the federal claims against the Board of Regents and the individual respondents in their official capacities are barred by the Eleventh Amendment and unauthorized by 42 U.S.C. 1983 (Supp. V 1999). Pet. App. 17a. Respondents also argued that the tort claims are barred by the Eleventh Amendment because the Georgia Tort Claims Act authorizes such suits against the State only in state court. *Ibid.* Respondents also asserted that the claims against the individual respondents in their individual capacities are barred by qualified immunity, and that petitioner's complaint fails to state a claim for relief under the Due Process Clause. *Id.* at 17a-18a.

The district court granted in part and denied in part respondents' motion to dismiss. Pet. App. 12a-28a. The court rejected respondents' Eleventh Amendment arguments, holding that the State had waived its immunity from suit in federal court when it voluntarily removed the case to that forum. *Id.* at 19a-24a. The court reasoned that "the Attorney General, as the State's counsel in this case, has the authority to waive the state's Eleventh Amendment immunity by and through his representation of the state irrespective of any express grant of authority to do so." *Id.* at 23a. The court dismissed the claims against the individual respondents in their personal capacities based on qualified immunity. *Id.* at 24a-27a. The court refused to dismiss the claims against the Board of Regents and the individual respondents in their official capacities for failure to state a claim, holding that petitioner might be able to establish that the State had an unconstitutional policy or custom. *Id.* at 27a-28a. The court did not address respondents' argument that Section 1983 does not authorize a suit for damages against the State.

2. On the State's interlocutory appeal, the court of appeals reversed the district court's Eleventh Amendment rulings. Pet. App. 1a-11a. Relying on *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), the court of appeals held that, absent explicit authority in the State's "constitution, statutes, and decisions," a State's Attorney General may not waive a State's Eleventh Amendment immunity from suit. Pet. App. 4a. The court noted that Georgia law specifically authorizes its Attorney General to represent the State in all litigation, *id.* at 6a, but the court concluded that, under *Ford*, such a grant of authority is not sufficient to empower a State's Attorney General to waive Eleventh Amendment immunity. *Ibid.* The court of appeals reaffirmed its holding in *In re Burke*, 146 F.3d 1313 (11th Cir. 1998), cert. denied, 527 U.S. 1043 (1999), that, even absent an express statutory waiver, a State's filing of a proof of claim in bankruptcy court waives the State's immunity from a suit seeking attorneys' fees for enforcement of an automatic stay and discharge injunction, but viewed *In re Burke* as "circumscribed by the context of bankruptcy." Pet. App. 7a.

The court of appeals acknowledged being "troubled by the seemingly inconsistent positions of the State by both asserting that the federal courts have jurisdiction to obtain removal, while simultaneously arguing with equal force that the federal courts do not have authority to hear the claims because of Eleventh Amendment immunity." Pet. App. 8a-9a. The court also noted that Justice Kennedy had stated in his concurring opinion in *Wisconsin Dep't of Corr.* v. *Schacht*, 524 U.S. 381 (1998), that *Ford Motor* is not an "insuperable obstacle to adopting a rule of waiver in every case where the State, through its attorneys, consents to removal from state court to the federal court." Pet. App. 9a (quoting

Schacht, 524 U.S. at 397 (Kennedy, J., concurring)). The court of appeals nevertheless concluded that, as suggested by the majority in *Schacht*, in a case such as this a federal court should hear the claims that are not barred by the Eleventh Amendment and remand to the state court the claims that are barred. *Id.* at 9a-10a. The court of appeals therefore instructed the district court "to hear only those non-barred claims over which it has jurisdiction and remand the others to state court." *Id.* at 11a. The court added that "[i]f no such non-barred federal questions exist, the whole case is to be remanded to state court." *Ibid.*

SUMMARY OF ARGUMENT

A State's removal of a case to federal court waives its Eleventh Amendment forum immunity. The court of appeals erred in holding that such a waiver is valid only if the removing official has express state law authority to consent to suit. When the asserted basis for a waiver of immunity is that state law affirmatively waives immunity for a particular type of suit, the relevant inquiry is whether state law expressly authorizes the waiver. But certain voluntary actions of a State waive the State's immunity as a matter of federal law, and in those contexts, an inquiry into whether state law expressly authorizes a state official to consent to suit is unnecessary.

A. In several federal statutes, for example, Congress has conditioned a State's access to federal programs or benefits on a waiver of immunity from suit. In those federal statutory schemes, federal law provides that a State's voluntary participation in the program itself waives immunity from suit. See *e.g.*, *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959). Any state attempt to negate that consequence

through reliance on state law is preempted under the Supremacy Clause.

B. Similarly, in a series of decisions, the Court has held that a State may waive its immunity from suit through invocation of federal court jurisdiction. Those cases include both those in which a State chooses a federal forum for litigating a claim, *Clark* v. *Barnard*, 108 U.S. 436 (1883); *Gardner* v. *New Jersey*, 329 U.S. 565 (1947), and ones in which a State is brought into federal court through coercive process, but then chooses to litigate a claim on the merits rather than assert an immunity defense, *Gunter* v. *Atlantic Coast Line R.R.*, 200 U.S. 273 (1906); *Richardson* v. *Fajardo Sugar Co.*, 241 U.S. 44 (1916). Under those decisions, the act of engaging in litigation conduct itself waives the State's immunity. At most, the Court inquires into whether state law authorizes a state actor to engage in certain litigation conduct; it does not inquire into whether state law authorized a waiver through litigation conduct. Otherwise, a State could litigate a claim on the merits, and if it wins, it would obtain the benefit of res judicata. But if it loses, it could simply assert immunity on appeal, arguing that its attorney lacked express state law authority to consent to suit.

C. The removal statute does not, like the law in *Petty* and other federal statutes, expressly condition a State's exercise of the removal option on its waiver of immunity from suit. Removal, however, is a form of litigation conduct that, like the conduct in *Clark* and *Gardner*, is a volitional action that waives a State's forum immunity. For a case to be removed, every defendant must consent, and once the option is exercised, the case is placed in the jurisdiction of a federal court and removed from the jurisdiction of a state court unless or until the federal court remands the case. A State that consents

to removal therefore voluntarily and unambiguously invokes federal court jurisdiction.

Nor does it matter that the State in this case asserted immunity on some claims at the same time that it invoked federal court jurisdiction on others. Once a State voluntarily invokes a federal forum, it cannot turn around and claim immunity from that forum. Acceptance of the court of appeals' contrary view would give a State unprecedented power to force a plaintiff to litigate a single case or controversy in two different forums. Nonetheless, while a State that removes a case is in the position of a plaintiff on the issue of forum selection, it remains an involuntary defendant on all other issues. Thus, while removal waives a State's Eleventh Amendment forum immunity, a State that removes a case retains all defenses that it would have had if the case had been litigated in state court.

D. The State's waiver of forum immunity is not negated by its Attorney General's absence of express state law authority to consent to suit. The court of appeals erred in relying on this Court's decision in *Ford Motor Co.* v. *Deptartment of Treasury*, to support a contrary conclusion. *Ford* is difficult to reconcile in principle with other cases that treat a State's litigation conduct in federal court as a waiver, and that consider state law, if at all, solely to determine whether the State's attorney had authority to litigate on the State's behalf. Accordingly, in an appropriate case, the Court may wish to reconsider that decision. At the very least, *Ford* can and should be limited to cases, like *Ford*, in which a State is brought into federal court through coercive process, and the State's failure to raise an immunity defense in a timely manner is the only basis for finding a waiver. Here, as in *Clark* and *Gardner*, the State affirmatively sought out the federal forum.

The State's removal therefore waives the State's forum immunity, and the State may not avoid that conclusion by asserting that its Attorney General lacked express state law authority to consent to suit.

ARGUMENT

A STATE THAT REMOVES A CASE WAIVES ITS ELEVENTH AMENDMENT FORUM IMMUNITY WITHOUT REGARD TO WHETHER ITS ATTORNEY GENERAL HAS EXPRESS STATE LAW AUTHORITY TO CONSENT TO SUIT

A State's sovereign immunity from suit in federal court is "a personal privilege which it may waive at pleasure." *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883). The court of appeals in this case held that the State's voluntary decision to remove the present case to federal court did not constitute such a waiver. The court based that holding in large part on its view that "a waiver of Eleventh Amendment immunity by state officials must be explicitly authorized by the state in its Constitution, statutes and decisions." Pet. App. 4a (citations and internal quote marks omitted). Because Georgia law does not expressly authorize the state Attorney General to waive immunity from suit, the court concluded, the Attorney's General's removal of the case to federal court could not effect a valid waiver. *Id.* at 6a.

The court of appeals fundamentally misconceived the relevance of state law to waiver issues. When the asserted basis for a waiver of sovereign immunity is that state law affirmatively waives the immunity for a certain type of suit, the relevant question is the one posed by the court of appeals—does state law expressly authorize the waiver. This Court has insisted on a particular clarity in the face of a suggestion that a state

law waives a State's sovereign immunity not only in its own courts, but in federal court as well. Accordingly, this Court has held that a State does not consent to suit in federal court when state law authorizes a state entity to "sue and be sued," *Florida Dep't of Health & Rehabilitative Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147, 149-150 (1981), or even when it authorizes suit against the State "in any court of competent jurisdiction," *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573, 577-579 (1946).

Under this Court's cases, however, a State can waive sovereign immunity not only through positive law, but through its actions. In those cases, the State's voluntary conduct waives the State's immunity as a matter of federal law, and no inquiry into whether state law expressly authorizes a state official to consent to suit is necessary.

A. A State Waives Immunity When it Voluntarily Participates In A Federal Program That Conditions Participation On A Waiver

One instance in which a State's voluntary conduct results in a waiver of immunity as a matter of federal law is when Congress conditions a State's access to a federal program or a federal benefit on a State's waiver of immunity from suit. For example, Congress has authority under the Constitution to condition approval of a federal compact between two States on the States' waiver of immunity from suit. *Petty*, 359 U.S. at 278-282. Congress also has authority to condition a State's receipt of federal funding on such a waiver. *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 246-247 (1985). In such cases, federal law provides that a State's voluntary

participation in a federal program will have certain consequences for a State's immunity from suit. Congress's authority to condition access to a federal program or benefit on a waiver of immunity is not without limits: Congress must make the condition sufficiently clear, *Atascadero*, 473 U.S. at 247, and the waiver of immunity must be related to the purposes of the underlying program. *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987). But those limits are a matter of federal law, and as long as those conditions are met, Congress may secure a waiver of immunity "indirectly" even though it could not impose such a waiver "directly." *Id.* at 210.[1]

Consistent with those principles, several federal statutes condition a State's access to a federal program or benefit on a State's waiver of immunity from suit. For example, as a condition to receiving federal funds, States must comply with certain nondiscrimination requirements that may be enforced by private parties in federal court. *E.g.*, 42 U.S.C. 2000d-7. A State's filing of a proof of claim in a bankruptcy court waives a State's immunity from claims that arise out of the same transaction or occurrence. 11 U.S.C. 106(b). And state

[1] In *College Savings*, the Court held that Congress lacks authority to prevent a State from engaging in commercial activity unless it consents to suit. The Court reasoned that "the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." 527 U.S. at 687. In that context, waiver and abrogation "are the same side of the same coin." *Id.* 683. At the same time, the Court distinguished conditions on otherwise lawful activity from conditions on participation in a federal program, and reaffirmed that Congress may condition a State's participation in federal programs on a waiver of immunity from suit. *Id.* at 686-687.

commissions that elect to participate in regulating telecommunications may have their decisions reviewed in federal court. 47 U.S.C. 252(e)(6).[2] In each of those federal statutory schemes, federal law provides that a State's voluntary participation in the federal program has the consequence of waiving immunity from suit. There is no requirement that the state entities or officials participating in the program have express state law authority to consent to suit.

This Court's decision in *Petty* establishes the validity of that approach. There, the Court held that two States had consented to suit in federal court by entering into a federal compact that contained a sue and be sued clause and that preserved previously existing federal court jurisdiction. The Court rejected the argument that the compact did not effect a waiver because state law in the respective States did not treat the language in the agreement as a waiver of immunity from suit. The Court acknowledged that "when the alleged basis of waiver of the Eleventh Amendment's immunity is a state statute, the question to be answered is whether the State has intended to waive its immunity." 359 U.S. at 278. It explained, however, that when the waiver is claimed to arise from a compact approved by Congress, the question whether there has been a waiver "is a question of federal law." *Id.* at 279. The Court then held that, because the terms of the compact and the circumstances surrounding it made it "clear" that the

[2] This Court has pending before it the question whether the Telecommunications Act of 1996 effects a valid waiver of the State's immunity from suit. See *Mathias* v. *WorldCom Techs., Inc.*, No. 00-878 (argued Dec. 5, 2001); *Verizon Md. Inc.* v. *Public Serv. Comm'n*, No. 00-1531, and *United States* v. *Public Serv. Comm'n*, No. 00-1711 (order directing briefing Dec. 12, 2001).

States accepting it waived immunity, the States "by accepting it and acting under it assume the conditions that Congress under the Constitution attached." *Id.* at 281-282.

The lesson of *Petty* is clear. When a State through its entities or officials voluntarily elects to participate in a federal program knowing that a consequence of participation is a waiver of immunity from suit, the State's waiver of immunity is just as much an "intentional relinquishment or abandonment of a known right or privilege" (*College Sav.*, 527 U.S. at 682) as a waiver that is expressly embodied in state law.

The Seventh Circuit made precisely that point in *MCI Telecommunications Corp.* v. *Illinois Bell Telephone Co.*, 222 F.3d 323 (2000). In that case, state commissions argued that they had no authority under state law to waive the State's immunity from suit and that their voluntary election to regulate telecommunications therefore could not effect a waiver of the State's immunity. The Seventh Circuit rejected that argument as follows:

> It is the states that have authorized the commissions to regulate the telecommunications industry, * * * and, despite the clear warning from Congress in subsection 252(e)(6) of the 1996 Telecommunications Act, neither Illinois nor Wisconsin have taken any steps to forbid their respective commissions from exercising the authority granted to them by Congress. * * * By accepting the grant of regulatory power offered by Congress, and by allowing the state commissions to exercise that power, Illinois and Wisconsin cannot contend now that they are not bound by the conditions attached to that grant of power.

Id. at 344 n.10.

Basic Supremacy Clause principles reinforce the Seventh Circuit's analysis. Because Congress has authority under the Constitution to condition state access to a federal program or benefit on a waiver of the State's immunity from suit, federal law determines the consequences of the State's voluntary actions, and any state effort to negate that condition through reliance on state law would be preempted by the Supremacy Clause. *Lawrence County* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 257-258 (1985) (state statute imposing restrictions on the way federal funds are intended to be spent "is invalid under the Supremacy Clause"). A State may not simultaneously accept the benefits of a federal program and fail to comply with the conditions upon which those benefits are extended. *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971) (state rule that conflicts with the conditions on which federal funds are offered is "invalid under the Supremacy Clause").

B. A State Waives Immunity When It Voluntarily Invokes Federal Court Jurisdiction Or Engages in Other Voluntary Litigation Conduct

A State may also waive its immunity from suit by voluntarily invoking federal court jurisdiction or through other voluntary litigation conduct. *College Sav.*, 527 U.S. at 675-676, 681 n.3. Several decisions of this Court illuminate the scope of that principle.

In *Clark* v. *Barnard*, 108 U.S. 436 (1883), a State intervened as a defendant in order to assert a claim to money sought by the plaintiff. The Court held that, by voluntarily entering the case as a party and asserting a claim to the money, the State had waived its immunity from suit. *Id.* at 447-448. The Court explained that the

State had "appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination." The Court added that the State had become "an actor as well as defendant." *Ibid.*

In *Gunter* v. *Atlantic Coast Line R.R.*, 200 U.S. 273 (1906), the Court addressed a railroad's effort to enforce a prior federal court judgment limiting the collection of certain state taxes. In the earlier litigation, the State, through its Attorney General and two county treasurers, raised no objection to federal court jurisdiction and litigated the case on the merits. The district court enjoined the collection of taxes, and this Court affirmed. See *Humphrey* v. *Pegues*, 83 U.S. (16 Wall.) 244 (1872). When the railroad initiated litigation to enforce the decree, the State argued for the first time that the original decree violated the Eleventh Amendment. This Court rejected that contention, explaining that "[a]lthough a state may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Id.* at 284. The Court added that "[n]one of the prohibitions" of the Eleventh Amendment "relate to the power of a Federal court to administer relief in causes where jurisdiction as to a State and its officers has been acquired as a result of the voluntary action of the State in

submitting its rights to judicial determination." *Id.* at 292.[3]

The Court extended *Gunter* in *Richardson* v. *Fajardo Sugar Co.*, 241 U.S. 44 (1916). There, the plaintiff filed suit against the treasurer of Puerto Rico to recover taxes that had been paid under protest. The State answered the complaint and agreed to a trial date, but raised an immunity defense eight months after the complaint was filed. Relying on *Gunter*, the Court held that "[w]hatever might have been the merit of this position if promptly asserted and adhered to, we hold, * * * that having solemnly appeared and taken the other steps above narrated, plaintiff in error could not thereafter deny the court's jurisdiction." *Id.* at 47.

Finally, in *Gardner* v. *New Jersey*, 329 U.S. 565 (1947), a State filed a proof of claim in bankruptcy, but later objected on Eleventh Amendment grounds when the trustee sought an adjudication of that claim. The Court held that the Eleventh Amendment did not bar an adjudication of the State's claim, explaining that "[w]hen the State becomes the actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim." *Id.* at 574.[4]

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[3] *Gunter*, thus, suggests that a State could not voluntarily litigate a case raising pendent state law claims through to dismissal of the federal claims on the merits and the pendent state law claims under 28 U.S.C. 1367(c), and then raise an Eleventh Amendment objection to the operation of 28 U.S.C.1367(d) in state court in the first instance. See Brief for the United States as Amicus Curiae at 18, *Raygor* v. *Regents of the Univ. of Minn.*, No. 00-1514 (argued Nov. 26, 2001).

[4] State participation in litigation does not invariably waive a State's immunity from suit. When a State declines to become a party, but makes an appearance for the limited purpose of object-

Under *Clark*, *Gunter*, *Richardson*, and *Gardner*, a State's submission to federal court jurisdiction waives immunity without regard to whether state law expressly authorizes the State's attorney or the state party appearing before the court to consent to suit. Federal law, rather than state law, determines the consequences of the State's litigation in federal court. In *Clark* and *Richardson*, the Court did not canvass state law at all before determining that the State's litigation conduct effected a waiver. *Clark*, 108 U.S. at 447-448; *Richardson*, 241 U.S. at 47. In *Gunter* and *Gardner*, the Court considered state law, but only for the limited purpose of determining that the state officials who represented the State in the proceedings had authority *to litigate* on behalf of the state. *Gunter*, 200 U.S. at 286 (noting that state law authorized the Attorney General to defend actions with respect to taxes "for and on behalf of the State"). *Gardner*, 329 U.S. at 574-575 (noting that state law authorized the Comptroller to "institute and direct prosecution * * * for just claims and debts due to the state," and authorized the Attorney General to "attend generally to all matters in which the state is a party or in which its rights and interests are involved"). The Court did not in any of the four cases inquire into whether state law expressly authorized the relevant state officials to *waive* the State's immunity from suit in federal court. Thus, at most, the Court inquires into whether state law authorizes a state actor to engage in certain litiga-

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ing to the court's jurisdiction, it does not waive its immunity from suit. *Clark*, 108 U.S. at 448. Similarly, when a State intervenes as a party for the limited purpose of obtaining an order to preserve the status quo, and does not "seek the determination of any rights or title," it does not waive its immunity from suit. *Missouri* v. *Fiske*, 290 U.S. 18, 24-25 (1933) (internal quote marks omitted).

tion conduct, not whether state law authorized a waiver through such conduct.

Considerations relating to the fair administration of justice support the Court's holdings that invocation of federal court jurisdiction waives Eleventh Amendment immunity, and that it does so without regard to whether state law gives state entities or officials express statutory authorization to consent to suit. If a State could invoke federal court jurisdiction and then disclaim consent to suit later, it would create for the States an opportunity to engage in litigation gamesmanship. A State could litigate a claim on the merits in federal court, and obtain the benefits of res judicata if it were to prevail. On the other hand, if it were to lose, it could simply assert immunity on appeal, arguing that its attorney lacked express authority to consent to suit. See *Wisconsin Dep't of Corr.* v. *Schacht*, 524 U.S. 381, 394 (Kennedy, J., concurring).

The only way for a district court to avoid that result would be for it to raise the immunity issue *sua sponte*, evaluate the state statutes concerning authority to waive, and dismiss the case if it found state law authority lacking. This Court has held, however, that a district court is not required to raise the issue of immunity *sua sponte*. *Schacht*, 524 U.S. at 389. Moreover, it would threaten harmonious federal-state relations for federal district courts routinely to ask the State's representatives in court whether they have authority to waive the State's immunity from suit. The potential for a strain on federal-state relations is particularly acute if the State's attorney represents that he has such authority and desires a decision on the merits, but the federal district court concludes, based on an examination of the relevant state-law authorities, that authority is lacking and dismisses the case. The principle of dual

sovereignty is not well served by a rule that forces federal courts to disregard representations made by counsel for the State and to engage in delicate inquiries into state law separation of powers principles.[5]

Treating invocation of federal court jurisdiction as a waiver of immunity does not unduly impair the State's ability to preserve its immunity from suit. A State that wishes to avoid waivers through litigation conduct may simply direct its attorneys not to invoke the jurisdiction of a federal court.[6]

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[5] The Fourth Circuit has held that when a State's attorney affirmatively waives an Eleventh Amendment defense, a district court lacks authority to dismiss the case on Eleventh Amendment grounds, even when an analysis of state law shows that the State's attorney lacks authority to consent to suit. *Montgomery* v. *Maryland*, 266 F.3d 334, 337 (4th Cir. 2001). The Fourth Circuit has also held, however, that once a State asserts immunity on appeal based on its attorney's lack of authority to consent to suit, a dismissal on Eleventh Amendment grounds is required. *Id.* at 338-339. Thus, under the Fourth Circuit's approach, a State has an absolute right to engage in risk-free litigation.

[6] Different considerations govern the United States' waiver of immunity from suit. The Appropriations Clause, Article I, Section 9, Clause 7, and the Property Clause, Art. IV, Section 3, Clause 2, allocate to Congress exclusive authority to appropriate money from the treasury and to exercise control over the government's property. *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990) (The Appropriations Clause means that "no money can be paid out of the Treasury unless it has been appropriated by an Act of Congress.") (citations omitted); *Gibson* v. *Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1872) ("Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring [federal] property, or any part of it, and to designate the persons to whom the transfer shall be made.") An Executive branch official therefore may not waive the United States' immunity from suits seeking money or property unless authorized to do so by Congress. *United States* v. *United States Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940) (money); *Stanley* v. *Schwalby*, 162 U.S. 255, 270 (1896) (property). In contrast, the

C. A State Waives Its Forum Immunity By Removing A Case

The remaining question is whether, under the principles discussed above, a State's removal of a case waives its immunity from suit. This is not a circumstance in which Congress has expressly conditioned a State's access to a federal program or benefit on its waiver of immunity from suit. The removal statute gives any litigant, including a State, a right to remove "any civil action" as long as it with falls within the jurisdiction of a federal district court. 28 U.S.C. 1441(a). The text of the removal statute does not in terms condition a State's exercise of that option on its waiver of immunity from suit. The principle that Congress has constitutional authority to condition access to a federal program or benefit on a waiver of immunity is therefore inapplicable.

Nonetheless, a State's removal of a case to federal court is a form of litigation conduct that waives a State's immunity from suit. The removal of a case requires the consent of every defendant. *Chicago, R.I. & Pac. R.R.*, v. *Martin*, 178 U.S. 245, 248 (1900). Accordingly, when a State is sued in state court, the case cannot be removed to federal court unless the State

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text of the Eleventh Amendment does not confine authority to waive immunity to the state's legislative branch. Cf. *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U.S. 278, 286, 290 (1913) ("State" in the Fourteenth Amendment refers to every person or entity "who is the repository of state power," and includes a State's legislative, executive, and judicial authorities.). Moreover, the question whether a statute waives the United States' sovereign immunity is a question of federal law well-suited to federal-court resolution. An inquiry into the authority of state officials to waive sovereign immunity, by contrast, puts the federal court in the awkward position of adjudicating sensitive state law questions.

either affirmatively seeks or voluntarily agrees to its removal. The removal of a case, moreover, unambiguously invokes the jurisdiction of a federal court: It removes the case from the jurisdiction of a state court and places jurisdiction over the case in federal court, unless or until the federal court remands the case to state court. 28 U.S.C. 1446(d) (the filing of a notice of removal in state court "shall effect the removal and the State court shall proceed no further unless and until the case is remanded").

A State that consents to the removal of a case therefore voluntarily and affirmatively invokes the jurisdiction of a federal court. Under cases such as *Clark*, *Gunter*, *Richardson*, and *Gardner*, such a voluntary election to proceed in federal court waives a State's immunity from suit. See pp. 13-16, *supra*,; see also *College Sav.*, 527 U.S. at 675-676 (this Court "will find a waiver" if a State "voluntarily invokes" federal court jurisdiction). Indeed, as in *Clark* and *Gardner*, with respect to the choice of the federal forum, "the State becomes the actor." *Gardner*, 329 U.S. at 574; see also *Clark*, 108 U.S. at 448 (noting the State had become "an actor as well as defendant").

Nor does it matter that the State in this case asserted its immunity from suit on particular claims at the same time that it invoked federal court jurisdiction on other claims. Pet. App. 2a. Once a State invokes the jurisdiction of the federal court, "it may not turn around and say the Eleventh Amendment bars the jurisdiction of the federal court." *Schacht*, 524 U.S. at 393 (Kennedy, J., concurring). The act of removing itself, not removal plus delay, gives rise to the waiver. Nothing in *Clark* or *Gardner* turned on the interval between the act that created the waiver and the assertion of an

Eleventh Amendment issue.[7] This is a situation "in which law usually says a party must accept the consequences of its own acts." *Id.* at 393 (Kennedy, J., concurring). If cases like *Clark* and *Gardner* did not make that clear before, the Court should do so now.

Under the court of appeals' contrary view, a State would have a right to invoke federal court jurisdiction to adjudicate certain claims, while simultaneously insisting that the federal court remand to state court the claims as to which the State has not waived immunity in federal court. Pet. App. 10a-11a, 16a & n.5, 17a. Acceptance of that position would give the State an unprecedented power to force a plaintiff to litigate a single case or controversy in two different forums.

To be sure, in *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 121-123 (1984) (*Pennhurst II*), the Court held that a plaintiff's interest in avoiding the splitting of a single case or controversy is not a sufficient justification for a federal court to exercise jurisdiction over a state law claim against the State without the State's consent. But in that case, the plaintiff could have avoided the splitting of the case or controversy by filing suit in state court. That result protects the plaintiff's interest in avoiding duplicative litigation and fully respects the purpose of the Eleventh Amendment by making States defendants in their own courts on their own terms.

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[7] In cases like *Gunter* and *Richardson*, the timing of the Eleventh Amendment objection has significance because the only voluntary act that may be construed as voluntary invocation of federal court jurisdiction is allowing the case to proceed against the State as a defendant without raising an objection. In *Clark* and *Gardner* and the removal context, an affirmative invocation of a federal forum, rather than a failure to object in a timely manner, gives rise to an inference of waiver.

Here, by contrast, the State seeks a right to *require* litigation in two forums, no matter where the plaintiff files suit. A State may genuinely prefer a federal forum to its own courts for an adjudication of a particular federal claim, Pet. App. 10a-11a, 15a n.4, but nothing in the Eleventh Amendment gives a State a right to require the adjudication of a single case or controversy in two different forums. Indeed, nothing in the text or purposes of the Eleventh Amendment supports affording the States a consequence-free right to prefer a federal forum over their own state courts. Thus, when a State is sued in state court, and there is a basis for removing the case, the State may either choose to have the whole case litigated in state court, or it may choose to have the whole case litigated in federal court. But the Constitution does not give the State a right to insist that the case be broken up and litigated in two forums at once.

Although a State's removal of a case effects a waiver of its immunity from suit in a federal forum, there are significant limits on the scope of that waiver. The Eleventh Amendment incorporates two forms of immunity. A State may choose not to be sued at all, or it may choose to be sued, but only in its own courts. *Pennhurst II*, 465 U.S. at 99. A removal of a case to federal court waives only forum immunity. By voluntarily and affirmatively selecting a federal forum for litigation of a case, the State consents to have a federal court rather than the state court decide the case. The act of removal, however, cannot be understood to waive any defenses that would have been available to the State in state court. The constitutional right not to be sued at all is just such a defense.

That conclusion reflects general Eleventh Amendment principles. The Eleventh Amendment has no

application when the State is a plaintiff, *United States* v. *Peters*, 9 U.S. (5 Cranch), 115, 139 (1809), but it applies with full force when the State is made a defendant through coercive process, *Fiske*, 290 U.S. at 21. The removal statute effectively puts a state defendant in the position of a plaintiff on the issue of forum selection. As this Court put it in *Clark* and *Gardner*, with respect to the forum, the State is the "actor." With respect to all issues other than forum selection, however, a State that removes a case remains an involuntary defendant that has been brought into court through coercive process. The State therefore should not lose any defenses that it would have had in state court.

Thus, to the extent that the Georgia Tort Claims Act waives the State's immunity from suit in state court on petitioner's tort claims, the State's removal of the case gives a federal court jurisdiction to resolve those claims. On the other hand, to the extent that the State would have a sovereign immunity defense to constitutional claims in state court, see *Alden* v. *Maine*, 527 U.S. 706 (1999), its removal of the case to federal court would not waive that defense.[8]

A State's removal of a case also does not waive its right to appeal to a district court's discretion to remand a case to state court. If, for example, a district court dismisses all federal claims in the removed case before trial, and all that remains is a state law claim against

---

[8] The question whether a State that removes a case waives its immunity to constitutional claims is largely academic. Section 1983 does not authorize a suit against a State in either state or federal court, *Arizonans for Offical English* v. *Arizona*, 520 U.S. 43, 68-69 (1997); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), and a State that removes a case may obtain the dismissal of constitutional claims against it on that basis.

the State, a district court may exercise its discretion to remand the case to state court for trial of that remaining claim. *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 351 (1988); 28 U.S.C. 1367(c), 1447(d). The State may not insist, however, that the Eleventh Amendment requires such a remand.

D. A State's Waiver Of Immunity Is Not Negated By Its Attorney General's Lack Of Express State Law Authority To Consent To Suit

Georgia law does not expressly authorize the State's Attorney General to waive the State's immunity from suit. Pet. App. 6a. Under *Clark*, *Gunter*, *Richardson*, and *Gardner*, however, a State's invocation of federal court jurisdiction waives immunity without regard to whether state law expressly authorizes the State's attorney to consent to suit. At most, those cases require an inquiry into whether the State's Attorney General has authority to litigate on behalf of the State. See p. 15, *supra*. Because Georgia law gives the State's Attorney General authority to litigate on the State's behalf, Pet. App. 6a, the Attorney General's removal of the case waives the State's forum immunity.

The court of appeals based its contrary conclusion on this Court's decision in *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945). Pet. App. 6a. In that case, a plaintiff sued the State to recover taxes paid in protest, and the State litigated the case on the merits, losing in both the district court and court of appeals. This Court granted the State's petition for certiorari based on the State's assertion that the court of appeals had decided an important issue of state tax law in conflict with a decision of the State's Supreme Court. *Id.* at 461-462. In this Court, the State asserted its immunity from suit for the first time, *Id.* at 467, and

the Court ordered the case dismissed on that basis, *id.* at 470.

In *Ford*, as in *Gunter* and *Richardson*, the only basis for finding a wavier was the State's failure to raise a timely Eleventh Amendment objection. Accordingly, the Court first held that the State's assertion of immunity was timely, explaining that "[t]he Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." 323 U.S. at 467. The Court then noted that the State had conceded that "if it is within the power of the administrative and executive officers of Indiana to waive the state's immunity, they have done so in this proceeding." *Ibid.* Following that observation, the Court stated that "[t]he issue thus becomes one of their power under state law to do so." *Ibid.* Although the Court noted that state law conferred on the State's Attorney General authority to litigate on behalf of the State, it concluded that state law could not "be deemed to confer on that officer power to consent to suit against the state in courts when the state has not consented to be sued." *Id.* at 468.

Ford is difficult to reconcile in principle with the other decisions discussed above that treat a State's litigation conduct in federal court as a waiver, and that consider state law, if at all, solely to determine whether the State's attorney had authority to litigate on its behalf. *Ford* also necessitates an awkward inquiry that goes beyond the state official's representations and turns on sensitive areas of state law. See pp. 17-18, *supra*. Accordingly, on an appropriate occasion, the Court may wish to consider whether *Ford* should be over-

ruled. At the very least, however, *Ford* can and should be limited to cases, like *Ford*, in which a State is brought into federal court through coercive process, and the only basis for finding a waiver is the State's litigation of the merits of a dispute without raising a timely immunity defense. That would reconcile *Ford* with all cases except *Richardson*. In *Clark* and *Gardner*, the State voluntarily became a party in federal court, and in *Gunter*, the State litigated the merits of the dispute all the way through this Court. In subsequent cases, this Court could decide whether to retain *Ford* as a viable precedent, or instead follow the earlier rule of *Richardson*.

Unlike the situation in *Ford* or *Richardson*, the State in this case was not brought into federal court through coercive process. Instead, like the States in *Clark* and *Gardner*, the State in this case affirmatively selected the federal court as its preferred forum. Whatever the continuing vitality of *Ford*, this case is governed by *Clark* and *Gardner*, rather than *Ford*. *Schacht*, 524 U.S. at 395 (Kennedy, J., concurring). The State's invocation of federal court jurisdiction therefore waives the State's forum immunity, and the State may not seek to avoid that conclusion by asserting that its Attorney General did not have express state law authority to consent to suit.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2001

No. 01-298

(5)

FILED

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CLERK

In The

Supreme Court of the United States

PAUL D. LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed August 20, 2001
Certiorari Granted October 29, 2001

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RELEVANT DOCKET ENTRIES

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April 13, 2000	–	Georgia's Notices of Removal (also reprinted at Pet. App. 34a), including Lapides' Complaint filed in Cobb County Superior Court (3/9/2000), Special Appearance Answer of Board of Regents of the University System of Georgia (4/13/2000), and Answer of Defendants Edwin A. Rugg, Timothy Mescon, and Teresa Joyce (4/13/2000)
April 13, 2000	–	Defendants' Motion to Dismiss Pursuant to FRCP 12(b)(1) and 12(b)(6) with Brief in Support of their Motion (also reprinted at Pet. App. 37a)
May 15, 2000	–	Plaintiff's Response in Opposition to Defendants' Motion to Dismiss
May 15, 2000	–	Plaintiff's Motion to Remand to State Court with Memorandum of Law in Support
June 12, 2000	–	Defendant Board of Regents' Response to Plaintiff's Motion to Remand
June 30, 2000	–	Plaintiff's Reply to Defendant Board of Regents' Response to Plaintiff's Motion to Remand
September 8, 2000	–	Order (reprinted at Pet. App. 12a)

September 14, 2000 – Notice of Appeal by Georgia

U.S. Court of Appeals for the Eleventh Circuit

May 24, 2001 – Opinion (reprinted at Pet. App. 1a)

U.S. Supreme Court

August 20, 2001 – Petition for Writ of Certiorari Filed

October 29, 2001 – Writ of Certiorari Granted

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PAUL D. LAPIDES,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; EDWIN A RUGG, personally and in his capacity as Vice-President for Academic Affairs at Kennesaw State University; TIMOTHY MESCON, individually and in his capacity as Dean of Coles College of Business at Kennesaw State University; and TERESA J. COVIN, a/k/a TERESA JOYCE, individually and in her capacity as Chair of the Department of Management & Entrepreneurship at Kennesaw State University,

Defendants.

CIVIL ACTION FILE NO. 1 00-CV-0953

NOTICE OF REMOVAL

(Filed April 13, 2000)

To: The Judges of the United States District Court for the Northern District of Georgia, Atlanta Division.

COME NOW Defendants in the above-styled matter and pursuant to 28 U.S.C. §§ 1441 and 1446, and within the time prescribed by law, file this Notice of Removal.

The Defendants file this notice subject to and without waiving any defenses available to the Defendants under state and federal law. The Defendants respectfully show the following:

1.

Plaintiff, Paul D. Lapides, has brought a civil action against the Defendants named above in the Superior Court of Cobb County, said action being designated as *Paul D. Lapides v. Board of Regents of the University System of Georgia, et al.*, Civil Action No. 00-1-01880-24. Plaintiff seeks to recover damages from the Defendants pursuant to 42 U.S.C. § 1983 for alleged violations of Plaintiff's Civil Rights under the United States Constitution and under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000(e), *et seq.*)

2.

This action is a civil action brought pursuant to 42 U.S.C. § 1983 and under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000(e), *et seq.*). Plaintiff's causes of action present federal questions over which this Court has original subject matter jurisdiction under the provisions of 28 U.S.C. § 1331, and, accordingly, is one which may be removed to this Court pursuant to the provisions of 28 U.S.C. §§ 1441(b) and 1443. The Defendants attach hereto a copy of the Complaint filed in the Superior Court of Cobb County, Georgia, on or about March 9, 2000 (Exhibit "A").

3.

The Georgia Department of Administrative Services was served with the Complaint on or about March 14, 2000. (Exhibit "B") Defendant Edwin A. Rugg was served with the Complaint on or about March 21, 2000. (Exhibit "C") Defendant Timothy Mescon was served with the Complaint on or about March 24, 2000. (Exhibit "D") Defendant Board of Regents of the University System of Georgia was served with the Complaint on or about March 27, 2000. (Exhibit "E") Defendant Teresa J. Covin was served with the Complaint on or about March 28, 2000. (Exhibit "F") On or about March 31, 2000, Plaintiff filed a Dismissal in the Superior Court of Cobb County dismissing Defendant Mescon from this action without prejudice. (Exhibit "G") Defendants attach hereto a true and accurate copy of the Notice of Removal to be filed in the Superior Court of Cobb County. (Exhibit "H"). Defendant Board of Regents of the University System of Georgia filed their Answer to Plaintiff's Complaint in the Superior Court of Cobb County on April 13, 2000. (Exhibit "I") Defendants Edwin A. Rugg, Timothy Mescon, and Teresa J. Covin filed their Answer to Plaintiff's Complaint in the Superior Court of Cobb County on April 13, 2000. (Exhibit "J") Exhibits "A" through "J" constitute all process, pleadings, and orders, which have been served on the Defendants in this case. Thirty (30) days from the date of service and receipt by the removing parties of the Complaint have not elapsed.

WHEREFORE, the Defendants move that this Notice of Removal be filed, that said action be removed to and proceed in this Court, and that no further proceedings be

had in the Superior Court of Cobb County, State of Georgia.

This 13 day of April, 2000.

Respectfully submitted,

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Attorney General

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Deputy Attorney General

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Senior Assistant Attorney General

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IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

PAUL D. LAPIDES, Plaintiff, v. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; EDWIN A RUGG, personally and in his capacity as Vice-President for Academic Affairs at Kennesaw State University; TIMOTHY MESCON, individually and in his capacity as Dean of Coles College of Business at Kennesaw State University; and TERESA J. COVIN, a/k/a TERESA JOYCE, individually and in her capacity as Chair of the Department of Management & Entrepreneurship at Kennesaw State University, Defendants.	CIVIL ACTION FILE NO. 00-1-01880-24

NOTICE OF REMOVAL

(Filed April 13, 2000)

To: The Clerk of the Superior Court of Cobb County, State of Georgia, and Patrick W. McKee and Lawrence E. Burke, P.C., attorneys for Plaintiff.

PLEASE TAKE NOTICE that Defendants have, on this date, filed in the United States District Court for the Northern District of Georgia, Atlanta Division, a Notice

of Removal of this action to said Court subject to and without waiving any defenses available to Defendants under state and federal law. All Defendants consent to the Removal of this action. Attached to said Notice of Removal was a copy of the Complaint filed in this State Court action. Defendants hereby give notice of such removal in accordance with the provisions of federal law. By virtue of said law, this case is now removed and further proceedings in the Superior Court of Cobb County are stayed.

This 13 day of April, 2000.

Respectfully submitted,

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IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

PAUL D. LAPIDES Plaintiff vs. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; EDWIN A. RUGG, personally and in his capacity as Vice-President for Academic Affairs at Kennesaw State University; TIMOTHY MESCON, individually and in his capacity as Dean of Coles College of Business at Kennesaw State University; and TERESA J. COVIN, a/k/a TERESA JOYCE, individually and in her capacity as Chair of the Department of Management & Entrepreneurship at Kennesaw State University. Defendants	CIVIL ACTION FILE NUMBER 00-1-01880-24

COMPLAINT

(Filed March 9, 2000)

COMES NOW, PAUL D. LAPIDES, the Plaintiff in the above-styled action and files this his Complaint, and in support thereof show the Court as follows:

1.

Paul D. Lapides is a professor at Kennesaw State University (hereinafter "KSU") in the Department of Management and entrepreneurship and has been employed at that position for the past 6½ years. Professor Lapides brings this action to address certain libelous, slanderous and defamatory statements and writings which have been disseminated about him and which have been placed in his personnel file at the University. Professor Lapides also seeks to redress complaints of a hostile work environment and the intentional infliction of emotional distress. Finally, Professor Lapides seeks the Court's assistance in protecting his constitutionally guaranteed right to practice his profession free from the procedural due process violations which have jeopardized his future.

2.

Defendant BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA (hereinafter "Board of Regents") may be served through its registered agents for service of process by serving Chancellor Stephen R. Portch, the Chief Executive Officer for the Board of Regents at 270 Washington Street, S.W., Atlanta, Georgia 30334, and by serving the Director of the Risk Management Division of the Department of Administrative Services who is Hugh Farley, at 200 Piedmont Avenue, S.E., Suite 1208, West Tower, Atlanta, Georgia 30334.

3.

Defendant EDWIN A. RUGG is a resident of Cobb County and may be served at his residence located at 2848 Windsor Oaks Trace, N.E., Marietta, Cobb County, Georgia.

4.

Defendant TIMOTHY MESCON is a resident of Fulton County, and may be served at his place of residence located at 320 Seamarsh Court, Atlanta, Fulton County, Georgia 30328.

5.

Defendant TERESA J. COVIN, a/k/a TERESA JOYCE, is a resident of Fulton County and may be served at her residence located at 1352 Middlesex Avenue, Atlanta, Fulton County, Georgia 30306.

6.

This Court has jurisdiction over the claims asserted herein and Plaintiff has served an ante litem notice on the Board of Regents and the Department of Administrative Services as required by O.C.G.A. Section 50-21-26 (a copy of which is attached hereto as Exhibit "A"), and venue is proper herein by virtue of the resident defendants and the fact that all tortious conduct attributable to the employees of the Board of Regents occurred at its KSU campus location in Cobb County, Georgia.

FACTUAL BACKGROUND

7.

Professor Lapides first received notice of a formal student complaint filed against him on August 1, 1997, in a letter from Melvis E. Atkinson, Minority Affairs Coordinator at KSU. The complaint made specific allegations that Plaintiff engaged in sexual harassment of a student.

8.

While Ms. Atkinson's investigations did not find any evidence to corroborate a single allegation made by the student complaintant, the investigation and all follow-up procedures associated therewith have resulted in an on-going course of conduct which has defamed Plaintiff in his profession; resulted in numerous violations of his due process rights and those rights guaranteed to him under KSU's own policies and procedures, violating his liberty and property interests in his constitutionally protected right to practice in his profession.

9.

KSU, through the persons of Defendants RUGG and COVIN have caused improper and defamatory material to be filed in the personnel record of the Plaintiff which currently makes it impossible for him to survive a background check for consideration of any Board of Directors or Board of Advisors positions for which he is routinely considered, or any academic, consulting or other professional employment apportunities [sic].

10.

Documentation of the defamatory material involving an alleged "informal complaint" of inappropriate conduct supposed to have occurred in April 1996, is clearly based upon fabricated documents prepared by COVIN and improperly dissminated [sic] to others, including RUGG who makes reference to the false allegations in his March 12, 1999 letter which is now a part of Professor Lapides' personnel records at KSU. (See Exhibit "B" attached hereto and incorporated herein by reference).

11.

COVIN's use of fabricated documents to defame Plaintiff, and RUGG's use and publication of this information after he knew or should have known of it [sic] origins, constitutes a malicious defamation of Plaintiff with knowledge of the false nature of the statements.

12.

Placement of the aforesaid "libeous matter" in Plaintiff's personnel records by RUGG with actual or constructive knowledge of COVIN's falsification of said records, constitutes a conspiracy by RUGG and COVIN to defame Professor Lapides, making each liable for the acts of the other.

13.

That following the dissemination of defamatory statements to others within the academic community who had no right or need to receive such information from

RUGG, MESCON or COVIN, Plaintiff was treated with contempt and was held out to public ridicule amongst his colleagues and the staff at KSU.

14.

That the placement of said defamatory writings in the personnel file of the Plaintiff and in other public KSU files subjects Professor Lapides to the further injustices identified in *Colonial Stores vs. Barrett*, 73 Ga.App. 839, 38 S.E.2d 306 (1946), by compelling him to publish the defamatory information every time he is considered for a position on a board of directors, board of advisors, at any academic instituion or public corporation.

15.

The maintenance and use of the defamatory writings referred to above violates KSU's policies paragraph XLII, titled: "Procedures For Handling Student Complaints Against Faculty Members" wherein it states:

> "The faculty member will receive copies of *any* written documents produced during the complaint resolution (*at any level*) and will be given the opportunity to respond to each document."' emphasis added

16.

The first notice Professor Lapides ever received of the existence of any written documents concerning the "informal complaint" referred to above was when the falsified documents were produced in response to an

open records request he made to KSU during the process of his defense of the "formal complaint" filed against him over two years after the documents were alleged to have been created.

17.

It is undisputed that COVIN's written documents were never shown to Plaintiff at the time the informal complaint was made and he was never given an opportunity to respond to the false and defamatory content of the documents.

18.

That upon discovering the existence of abuses in the university system at KSU involving the investigation of student complaints against faculty members and trying to secure assistance from superiors to correct the abuses; Plaintiff's employment at KSU was threatened, he was turned down for promotion and he received a disproportionately lower raise than other individuals similarly situated. These actions were taken despite Professor Lapides' evaluations which consistently judged him to be at or above expectations, in all categories of his work at KSU.

19.

That as a result of the manner in which supervisory personnel have treated Professor Lapides, he is currently being subjected to a hostile work environment and has suffered from the intentional infliction of emotionaly [sic]

distress causing him to seek medical attention for the physical damage resulting to him.

20.

The use of falsified documents to defame him and bring his professional reputation into disrepute, the disparate treatment he has received at the hands of his immediate supervisor COVIN, the job threats and warnings to colleagues to disenfranchise themselves from Plaintiff, indicate that the behavior complained of and is described herein by RUGG, MESCON and COVIN is wilful, wanton and intentionally directed toward harming Professor Lapides.

21.

As a result of Professor Lapides' reputation in the business community, his membership on several boards and organizations promoting the advancement of women and minorities in the corporate arena and his numerous articles on the subject, the content of the defamatory material involved herein is clearly of a nature so as to naturally humiliate, embarass [sic] and outrage the Plaintiff.

22.

As a direct result of the cummulative [sic] effects of the foregoing acts and omissions by KSU personnel, Professor Lapides has been placed on medication to help him deal with the inordinate stress brought on by the conduct of the Defendants.

23.

That the allegations of writen [sic] and oral defamation contained herein were specifically calculated to injure Plaintiff and damage his reputation within his profession as an author, consultant and expert in the field of corporate goverance [sic], and as a profesor [sic] and lecturer in this area.

24.

That the placement of the aforesaid information into the Plaintiff's personnel file constitutes an invasion of privacy which portrays Plaintiff in a false light and subjects him to public disclosure of embarassing [sic] facts.

25.

Defendants' tortious actions warrant the award of punative [sic] damages and expenses of litigation including, but not limited to, an award of attorneys fees for the prosecution of this action.

26.

Plaintiff also seeks a judicial finding that the items which have been placed in the public records of KSU are defamatory to Plaintiff, thereby giving rise to a new cause of action by Plaintiff against Defendants every time this information is published to a new party.

27.

Concurrent with the filing of this Complaint, Plaintiff is also filing a complaint with the Equal Employment

Opportunity Commission based upon claims of disparate and discriminatory treatment against him on the basis of religion, gender and for retaliation. Upon the receipt of the appropriate authorization, it is anticipated that these claims will be added to the within and foregoing complaint as an amendment.

WHEREFORE, Plaintiff prays:

(a) That this Court take jurisdiction over the matters presented herein;

(b) That Plaintiff be awarded damages as compensation for his claims in an amount in excess of $1,000,000.00;

(c) That Plaintiff be awarded punative [sic] damages in an amount to be determined by the enlightened conscious [sic] of the jury;

(d) That Plaintiff be awarded his reasonable expenses of litigation including, but not limited to, attorneys fees; and

(e) For such other and further relief as the court deems just and proper.

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IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

PAUL D. LAPIDES, Plaintiff, v. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; EDWIN A RUGG, personally and in his capacity as Vice-President for Academic Affairs at Kennesaw State University; TIMOTHY MESCON, individually and in his capacity as Dean Kennesaw State University; and TERESA J. COVIN, a/k/a TERESA JOYCE, individually and in her capacity as Chair of the Department of Management & Entrepreneurship at Kennesaw State University, Defendants.	*	CIVIL ACTION NO. 00-1-01880-24

SPECIAL APPEARANCE ANSWER OF DEFENDANT BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

(Filed April 13, 2000)

COMES NOW the Board of Regents of the University System of Georgia, named as a Defendant in the above styled civil action, and without submitting itself to the jurisdiction of this Court responds to the Plaintiff's Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Plaintiff's tort claim should be dismissed due to failure of process, improper service of process, or insufficiency of service of process. Specifically, Plaintiff has failed to cause process to be accomplished as required by O.C.G.A. § 50-21-35.

THIRD DEFENSE

This Court lacks jurisdiction over this Defendant.

FOURTH DEFENSE

Subject matter jurisdiction is lacking.

FIFTH DEFENSE

Plaintiff's claims and remedies are barred, in whole or in part, by the applicable statutes of limitations.

SIXTH DEFENSE

More than ninety (90) days have not elapsed after presentation of a notice of claim to the Department of Administrative Services, nor has the Department of Administrative Services yet issued a denial of this claim, with the result that the present action was commenced prematurely and there is no subject matter jurisdiction of

the Plaintiff's tort claim under the Georgia Tort Claims Act, pursuant to O.C.G.A. § 50-21-26(b).

SEVENTH DEFENSE

The purported ante litem notice attached as Exhibit "A" to Plaintiff's Complaint is insufficient and fails to satisfy the requirements of O.C.G.A. § 50-21-26(a), with the result that the mandatory prerequisites of O.C.G.A. § 50-21-26 have not been satisfied and the Complaint should be dismissed for failure to state a claim upon which relief can be granted.

EIGHTH DEFENSE

Plaintiff has failed to attach to the Complaint a certificate that the requirement of mailing to the Attorney General has been met pursuant to O.C.G.A. § 50-21-35.

NINTH DEFENSE

At all times relevant, this Defendant's employees were exercising due care in the execution of a statute, regulation, rule or ordinance, with the result that this Defendant is immune from suit pursuant to O.C.G.A. § 50-21-24(1).

TENTH DEFENSE

Plaintiff's Complaint should be dismissed to the extent said Complaint alleges losses resulting from the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a

state officer or employee, whether or not the discretion involved is abused, for which there is no waiver of sovereign immunity under the Georgia Tort Claims Act, pursuant to O.C.G.A. § 50-21-24(2).

ELEVENTH DEFENSE

This Defendant's employee committed no tortious act or omission that would entitle the Plaintiff to recover against this Defendant in this case.

TWELFTH DEFENSE

The Plaintiff has failed to exhaust his administrative remedies with regard to his employment and due process claims, with the result that he is precluded by law from bringing such claims in this action.

THIRTEENTH DEFENSE

The Plaintiff is statutorily precluded from recovering in tort an amount in excess of the limitations on damages contained in O.C.G.A. § 50-21-29(b).

FOURTEENTH DEFENSE

Plaintiff's Complaint should be dismissed to the extent it alleges recovery in his tort claim of punitive damages or interest prior to judgment, because such damages are not permitted pursuant to O.C.G.A. § 50-21-30.

FIFTEENTH DEFENSE

Plaintiff's tort claim should be dismissed to the extent it alleges recovery of expenses of litigation, including attorney fees, which are not recoverable pursuant to the Georgia Tort Claims Act.

SIXTEENTH DEFENSE

Plaintiff's Complaint should be dismissed to the extent said Complaint alleges losses resulting from libel or slander, for which there is no waiver of sovereign immunity under the Georgia Tort Claims Act, pursuant to O.C.G.A. § 50-21-24(7).

SEVENTEENTH DEFENSE

The Complaint should be dismissed to the extent it alleges losses resulting from legislative, judicial, quasi-judicial, or prosectorial action or inaction, for which there is no waiver of sovereign immunity under the Georgia Tort Claims Act, pursuant to O.C.G.A. § 50-21-24(4).

EIGHTEENTH DEFENSE

The Complaint should be dismissed to the extent it alleges losses resulting from administrative action or inaction of a legislative, quasi-legislative, judicial, or quasi-judicial nature, for which there is no waiver of sovereign immunity under the Georgia Tort Claims Act, pursuant to O.C.G.A. § 50-21-24(5).

NINETEENTH DEFENSE

The Plaintiff's purported ante litem notice was not timely submitted to the extent the alleged loss, or any part thereof, occurred prior to March 9, 1999.

TWENTIETH DEFENSE

This Defendant is protected by the doctrine of sovereign immunity.

TWENTY-FIRST DEFENSE

Plaintiff's claims are barred by the Eleventh Amendment to the United States Constitution.

TWENTY-SECOND DEFENSE

Plaintiff's claims are barred by res judicata or collateral estoppel.

TWENTY-THIRD DEFENSE

Defendants have at all times acted in good faith and in a reasonable and prudent manner, exercising the degree of due care required in carrying out any duties allegedly owed to Plaintiff and have completely carried out their duties in a reasonable and prudent manner.

TWENTY-FOURTH DEFENSE

Plaintiff has not been deprived of any rights, privileges or immunities secured under the Constitution or the laws of the United States.

TWENTY-FIFTH DEFENSE

Defendants have acted at all times upon the existence of reasonable grounds of belief formed at the time and in light of all circumstances known to them.

TWENTY-SIXTH DEFENSE

All actions taken by Defendants with respect to Plaintiff were taken for legitimate, non-discriminatory, non-retaliatory business reasons.

TWENTY-SEVENTH DEFENSE

Defendants are not liable to Plaintiff because they have not discriminated against Plaintiff on the basis of his religion, gender, or any other unlawful factor.

TWENTY-EIGHTH DEFENSE

Plaintiff's claims under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, *et. seq.*), are barred to the extent that the Plaintiff has failed to satisfy all jurisdictional and administrative prerequisites for such claims.

TWENTY-NINTH DEFENSE

Plaintiff's claims under Title VII of the Civil Rights Act of 1964, as amended, are barred to the extent they were not asserted in his charges of Discrimination filed with the Equal Employment Opportunity Commission and/or the Georgia Commission on Equal Opportunity.

THIRTIETH DEFENSE

Plaintiff's claims under Title VII of the Civil Rights Act of 1964, as amended, are barred to the extent that such claims did not arise within 300 days prior to the filing of his Charge of Discrimination filed with the Equal Employment Opportunity Commission and/or the Georgia Commission on Equal Opportunity.

THIRTY-FIRST DEFENSE

Plaintiff is not entitled to punitive damages because Defendants have not acted with ill will or callous disregard towards Plaintiff's federally guaranteed rights.

THIRTY-SECOND DEFENSE

Plaintiff's claims are barred as Plaintiff has failed to establish that he has brought this action within ninety (90) days after receipt of the statutorily required "right to sue" letter.

THIRTY-THIRD DEFENSE

Defendants reserve the right to raise any additional defenses allowed by law as evidence is discovered in pursuit of this litigation.

THIRTY-FOURTH DEFENSE

Answering the specific paragraphs of Plaintiff's Complaint, this Defendant shows the following:

1.

This Defendant admits the allegations contained in the first sentence of paragraph 1 of the Complaint, except that the Plaintiff is an assistant professor. In response to the remaining allegations contained in paragraph 1 of the Complaint, this Defendant shows that it is without knowledge or information sufficient to form a belief as to the reasons why the Plaintiff brings this action, and can neither admit nor deny the same. However, this Defendant denies that the Plaintiff is entitled to recover based upon the contentions set forth in paragraph 1.

2.

In response to the allegations contained in paragraph 2 of the Complaint, this Defendant admits that service as set forth in paragraph 2 of the Complaint is required, but denies that such service is all that is required to perfect service on this Defendant pursuant to the Georgia Tort Claims Act.

3.

This Defendant admits the allegations contained in paragraph 3 of the Complaint.

4.

This Defendant admits the allegations contained in paragraph 4 of the Complaint.

5.

This Defendant admits the allegations contained in paragraph 5 of the Complaint.

6.

This Defendant denies the allegations contained in paragraph 6 of the Complaint.

7.

This Defendant admits the allegations contained in paragraph 7 of the Complaint, but shows that an informal complaint had been made prior to that date and the Plaintiff was aware of said informal complaint.

8.

This Defendant denies the allegations contained in paragraph 8 of the Complaint.

9.

This Defendant denies the allegations contained in paragraph 9 of the Complaint.

10.

This Defendant denies the allegations contained in paragraph 10 of the Complaint.

11.

This Defendant denies the allegations contained in paragraph 11 of the Complaint.

12.

This Defendant denies the allegations contained in paragraph 12 of the Complaint.

13.

This Defendant denies the allegations contained in paragraph 13 of the Complaint.

14.

This Defendant denies the allegations contained in paragraph 14 of the Complaint.

15.

This Defendant denies the allegations contained in paragraph 15 of the Complaint.

16.

This Defendant denies as pled the allegations contained in paragraph 16 of the Complaint. This Defendant further shows that said documents were not "falsified", and that the only incorrect notation was the reference to the timing of the meeting with the Plaintiff regarding the informal complaint as being after Plaintiff's father's death. The substance of the discussion and results of the

meeting regarding the informal complaint that had been made about the Plaintiff were correct. This Defendant denies that said documents were produced over two years after they were made.

17.

This Defendant denies as pled the allegations contained in paragraph 17 of the Complaint. This Defendant further denies that the documents were defamatory and/or false. This Defendant admits that the documents were not shown to the Plaintiff, but shows that the meeting he had with his department chair was his opportunity to respond to the informal complaint, and his response was to admit the contentions made by the complainant.

18.

This Defendant denies the allegations contained in paragraph 18 of the Complaint.

19.

This Defendant denies the allegations contained in paragraph 19 of the Complaint.

20.

This Defendant denies the allegations contained in paragraph 20 of the Complaint.

21.

This Defendant denies the allegations contained in paragraph 21 of the Complaint.

22.

In response to the allegations contained in paragraph 22 of the Complaint, this Defendant is without knowledge or information sufficient to form a belief as to whether the Plaintiff takes medication for stress. However, this Defendant denies that it is responsible for causing said alleged stress.

23.

This Defendant denies the allegations contained in paragraph 23 of the Complaint.

24.

This Defendant denies the allegations contained in paragraph 24 of the Complaint.

25.

This Defendant denies the allegations contained in paragraph 25 of the Complaint.

26.

This Defendant denies the allegations contained in paragraph 26 of the Complaint.

27.

This Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 27 of the Complaint, and can neither admit nor deny the same.

THIS DEFENDANT DEMANDS A TRIAL BY A TWELVE (12) PERSON JURY ON ANY ISSUE OF FACT NOT CAPABLE OF RESOLUTION AS A MATTER OF LAW.

This Defendant denies any and all other allegations in the Complaint not referred to herein specifically by number, denies all prayers of the Complaint, and denies that the Plaintiff is entitled to recover against this Defendant.

WHEREFORE, having fully responded to the allegations of Plaintiff's Complaint, this Defendant prays that it be dismissed with costs taxed to the Plaintiff.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

KATHLEEN M. PACIOUS 558555
Deputy Attorney General

/s/ Loretta L. Pinkston
LORETTA L. PINKSTON 580385
Senior Assistant Attorney General

/s/ Ralph W. Ellis
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Assistant Attorney General

/s/ Devon Orland
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IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

PAUL D. LAPIDES, Plaintiff, v. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; EDWIN A. RUGG, personally and in his capacity as Vice-President for Academic Affairs at Kennesaw State University; TIMOTHY MESCON, individually and in his capacity as Dean of Kennesaw State University; and TERESA J. COVIN, a/k/a TERESA JOYCE, individually and in her capacity as Chair of the Department of Management and Entrepreneurship at Kennesaw State University. Defendants,	CIVIL ACTION NO. 00-1-01880-24

ANSWER OF DEFENDANTS EDWIN A. RUGG, TIMOTHY MESCON, and TERESA JOYCE

(Filed Apr. 13, 2000)

COME NOW Edwin A. Rugg, Timothy Mescon, and Teresa Joyce, named as Defendants in the above styled civil action, and respond to the Plaintiff's Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Subject matter jurisdiction is lacking.

THIRD DEFENSE

Plaintiff's claims are barred, in whole or in part, by the applicable statutes of limitations.

FOURTH DEFENSE

Plaintiff's tort claim against these Defendants should be dismissed because all actions allegedly taken by them were taken while acting within the scope of their official duties or employment with the State of Georgia; thus, these Defendants are not subject to lawsuit or liability therefor, pursuant to O.C.G.A. § 50-21-25(a).

FIFTH DEFENSE

These Defendants committed no act or omission that would entitle the Plaintiff to recover in this case.

SIXTH DEFENSE

The Plaintiff has failed to exhaust his administrative remedies with regard to his employment and due process claims, with the result that he is precluded by law from bringing such claims in this action.

SEVENTH DEFENSE

Plaintiff's Complaint should be dismissed to the extent it alleges recovery of punitive damages or interest prior to judgment.

EIGHTH DEFENSE

Plaintiff's Complaint should be dismissed to the extent it alleges recovery of expenses of litigation, including attorney fees.

NINTH DEFENSE

These Defendants are protected by the doctrine of sovereign immunity.

TENTH DEFENSE

These Defendants are protected by the doctrine of qualified immunity.

ELEVENTH DEFENSE

Plaintiff's claims are barred by the Eleventh Amendment to the United States Constitution.

TWELFTH DEFENSE

Plaintiff's claims are barred by res judicata or collateral estoppel.

THIRTEENTH DEFENSE

Defendants have at all times acted in good faith and in a reasonable and prudent manner, exercising the degree of due care required in carrying out any duties allegedly owed to Plaintiff and have completely carried out their duties in a reasonable and prudent manner.

FOURTEENTH DEFENSE

Plaintiff has not been deprived of any rights, privileges or immunities secured under the Constitution or the laws of the United States.

FIFTEENTH DEFENSE

Defendants have acted at all times upon the existence of reasonable grounds of belief formed at the time and in light of all circumstances known to them.

SIXTEENTH DEFENSE

All actions taken by Defendants with respect to Plaintiff were taken for legitimate, non-discriminatory, non-retaliatory business reasons.

SEVENTEENTH DEFENSE

Defendants are not liable to Plaintiff because they have not discriminated against Plaintiff on the basis of his religion, gender, or any other unlawful factor.

EIGHTEENTH DEFENSE

Plaintiff's claims under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, *et. seq.*), are barred to the extent that the Plaintiff has failed to satisfy all jurisdictional and administrative prerequisites for such claims.

NINETEENTH DEFENSE

Plaintiff's claims under Title VII of the Civil Rights Act of 1964, as amended, are barred to the extent they were not asserted in his Charges of Discrimination filed with the Equal Employment Opportunity Commission and/or the Georgia Commission on Equal Opportunity.

TWENTIETH DEFENSE

Plaintiff's claims under Title VII of the Civil Rights Act of 1964, as amended, are barred to the extent that such claims did not arise within 300 days prior to the filing of his Charge of Discrimination filed with the Equal Employment Opportunity Commission and/or the Georgia Commission on Equal Opportunity.

TWENTY-FIRST DEFENSE

Plaintiff's claims against these Defendants under Title VII of the Civil Rights Act of 1964, as amended, are barred as these Defendants are not "employer[s]" as that term is defined under 42 U.S.C. 2000e.

TWENTY-SECOND DEFENSE

Plaintiff is not entitled to punitive damages because Defendants have not acted with ill will or callous disregard towards Plaintiff's federally guaranteed rights.

TWENTY-THIRD DEFENSE

Plaintiff's claims are barred as Plaintiff has failed to establish that he has brought this action within ninety (90) days after receipt of the statutorily required "right to sue" letter.

TWENTY-FOURTH DEFENSE

Defendants reserve the right to raise any additional defenses allowed by law as evidence is discovered in pursuit of this litigation.

TWENTY-FIFTH DEFENSE

Answering the specific paragraphs of Plaintiff's Complaint, these Defendants show the following:

1.

These Defendants admit the allegations contained in the first sentence of paragraph 1 of the Complaint, except that the Plaintiff is an assistant professor. In response to the remaining allegations contained in paragraph 1 of the Complaint, these Defendants show that they are without knowledge or information sufficient to form a belief as to the reasons why the Plaintiff brings this action, and can

neither admit nor deny the same. However, these Defendants deny that the Plaintiff is entitled to recover based upon the contentions set forth in paragraph 1.

2.

These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint, and can neither admit nor deny the same.

3.

Defendant Rugg admits the allegations contained in paragraph 3 of the Complaint. Defendants Mescon and Joyce are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the Complaint, and can neither admit nor deny the same.

4.

Defendant Mescon admits the allegations contained in paragraph 4 of the Complaint. Defendants Rugg and Joyce are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint, and can neither admit nor deny the same.

5.

Defendant Joyce admits the allegations contained in paragraph 5 of the Complaint. Defendants Rugg and

Mescon are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the Complaint, and can neither admit nor deny the same.

6.

These Defendants deny the allegations contained in paragraph 6 of the Complaint.

7.

These Defendants admit the allegations contained in paragraph 7 of the Complaint, but show that an informal complaint had been made prior to that date and the Plaintiff was aware of said informal complaint.

8.

These Defendants deny the allegations contained in paragraph 8 of the Complaint.

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These Defendants deny the allegations contained in paragraph 9 of the Complaint.

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These Defendants deny the allegations contained in paragraph 10 of the Complaint.

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results of the meeting regarding the informal complaint that had been made about the Plaintiff were correct. These Defendants deny that said documents were produced over two years after they were made.

17.

These Defendants deny as pled the allegations contained in paragraph 17 of the Complaint. These Defendants further deny that the documents were defamatory and/or false. These Defendants admit that the documents were not shown to the Plaintiff, but show that the meeting he had with his department chair was his opportunity to respond to the informal complaint, and his response was to admit the contentions made by the complainant.

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In response to the allegations contained in paragraph 22 of the Complaint, these Defendants are without knowledge or information sufficient to form a belief as to whether the Plaintiff takes medication for stress. However, these Defendants deny that they are responsible for causing said alleged stress.

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These Defendants deny the allegations contained in paragraph 26 of the Complaint.

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These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 27 of the Complaint, and can neither admit nor deny the same.

THESE DEFENDANTS DEMAND A TRIAL BY A TWELVE (12) PERSON JURY ON ANY ISSUE OF FACT NOT CAPABLE OF RESOLUTION AS A MATTER OF LAW.

These Defendants deny any and all other allegations in the Complaint not referred to herein specifically by number, deny all prayers of the Complaint, and deny that the Plaintiff is entitled to recover against these Defendants.

WHEREFORE, having fully responded to the allegations of Plaintiff's Complaint, these Defendants pray that it be dismissed with costs taxed to the Plaintiff.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

KATHLEEN M. PACIOUS 558555
Deputy Attorney General

/s/ Loretta L. Pinkston
LORETTA L. PINKSTON 580385
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/s/ Ralph W. Ellis
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/s/ Devon Orland
DEVON ORLAND 554301
Assistant Attorney General

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PAUL D. LAPIDES,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; EDWIN A RUGG, personally and in his capacity as Vice-President for Academic Affairs at Kennesaw State University; TIMOTHY MESCON, individually and in his capacity as Dean of Coles College of Business at Kennesaw State University; and TERESA J. COVIN, a/k/a/ TERESA JOYCE, individually and in her capacity as Chair of the Department of Management & Entrepreneurship at Kennesaw State University,

Defendants.

CIVIL ACTION
FILE NO.
1 00-CV-0953

DEFENDANTS' MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

(Filed April 13, 2000)

COME NOW Defendants, Board of Regents of the University System of Georgia, Edwin A. Rugg, Timothy Mescon, and Teresa J. Covin, a/k/a Teresa Joyce, and within the time permitted by law, make and file this

Motion to Dismiss pursuant to Federal Rules of 12(b)(1) and 12(b)(6). This Court lacks subject matter jurisdiction on this action based on the following:

(1) Plaintiff's Title VII claims are barred because the Plaintiff has failed to establish that Plaintiff received a "right to sue" letter from the Equal Employment Opportunity Commission and filed this action within ninety days of that receipt.

Defendants further move that the Court dismiss Plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that:

(1) Plaintiff has failed to state a claim for which relief can be granted.

(2) Defendants have Eleventh Amendment Immunity from suit.

(3) Defendants have qualified immunity.

(3) [sic] Defendants are protected by sovereign immunity.

For these reasons, Defendants respectfully request that Plaintiff's Complaint be dismissed in its entirety.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

KATHLEEN M. PACIOUS 558555
Deputy Attorney General

/s/ Loretta L. Pinkston
LORETTA L. PINKSTON 580385
Senior Assistant Attorney General

/s/ Devon Orland
DEVON ORLAND 554301
Assistant Attorney General

/s/ Ralph W. Ellis
RALPH W. ELLIS 295840
Assistant Attorney General

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PAUL D. LAPIDES, Plaintiff, v. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; EDWIN A. RUGG, personally and in his capacity as Vice President for Academic Affairs at Kennesaw State University; and TERESA J. COVIN, a/k/a TERESA JOYCE, individually and in her capacity as Chair of the Department of Management & Entrepreneurship at Kennesaw State University, Defendants.	)	CIVIL ACTION NO. 1:00-CV-0953-TWT

PLAINTIFF'S MOTION TO REMAND TO STATE COURT

Comes now, Paul D. Lapides, Plaintiff in the above-styled action, and within thirty days of removal, pursuant to 28 U.S.C. § 1447(c) files this his motion to remand this case to the Superior Court of Cobb County, State of Georgia. As explained in the memorandum of law submitted in support of this motion, grounds for remand are that the removal procedure was defective.

Wherefore, Plaintiff prays that this Honorable Court remand the case and order Defendants to pay Plaintiff's just costs and actual expenses (including attorney's fees) incurred as a result of the removal.

Respectfully submitted,

/s/ Susan J. Rickertsen
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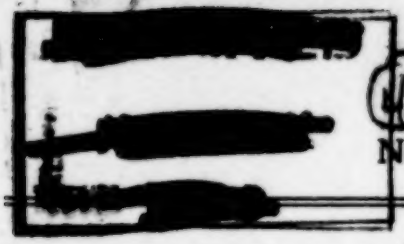

DEC 19 2001

No. 01-298

Supreme Court, U.S.
FILED
DEC 19 2001
CLERK

In The

Supreme Court of the United States

PAUL D. LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S BRIEF ON THE MERITS

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Scpt

QUESTION PRESENTED FOR REVIEW

Does a state waive its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court and then seeks a dispositive ruling?

LIST OF PARTIES BELOW

In addition to the parties reflected in the caption, also defendants in the proceedings below were Edwin A. Rugg (personally and in his capacity as Vice-President of Academic Affairs, Kennesaw State University (KSU)), Timothy Mescon (individually and in his capacity as Dean of the Coles College of Business at KSU), and Teresa J. Covin (personally and in her capacity as Chair of the Department of Management & Entrepreneurship at KSU). Mr. Mescon was later dismissed without prejudice from the suit.

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit, *Lapides v. Board of Regents of the University System of Georgia*, No. 00-14984 (11th Cir. May 24, 2001), is reported at 251 F.3d 1372, and is reprinted at Pet. App. 1a. The U.S. District Court's Order of September 8, 2000, is unreported but is reprinted at Pet. App. 12a.

STATEMENT OF JURISDICTION

Petitioner has been granted review from the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit of May 24, 2001. This Court granted the Petition for Writ of Certiorari on October 29, 2001. The Supreme Court has jurisdiction to review cases from the Courts of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI.

Respondents jointly removed a complaint filed in state court to federal court, under the authority of 28 U.S.C. §§ 1441,

1443 & 1446, reprinted in pertinent part at Pet. App. 29a-33a.

STATEMENT

1. Petitioner, Paul D. Lapides, is tenured as an Assistant Professor of Management and Entrepreneurship and Director of the Corporate Governance Center at the Michael J. Coles College of Business at Kennesaw State University (KSU), in Kennesaw, Georgia. KSU is a unit of the State University System of Georgia under its Board of Regents ("Regents"). Aggrieved because of various personnel actions taken against him by KSU administrators, J.A. 12-17, Lapides brought suit in Superior Court of Cobb County, State of Georgia, on March 9, 2000, naming as defendants the Regents and three KSU administrators in both their personal and official capacities. See, *supra*, at (ii).

Lapides' state court complaint sounded in Georgia's common law torts of defamation, intentional infliction of emotional distress, invasion of privacy, and false light disclosures. J.A. 12-14 (¶¶ 9-15); 16 (¶ 19); 17 (¶ 24). Lapides also included an allegation that defendants had violated his constitutional due process rights. J.A. 12 (¶ 8) (defendants' conduct "resulted in numerous violations of [Lapides'] due process rights . . . ."). The gravamen of the complaint was that KSU administrators had placed false and defamatory material into Lapides' personnel files, and had disseminated such statements extensively, which had resulted in substantial reputational injury for Lapides. In his state court complaint, Lapides also gave notice that his grievance before the U.S. Equal Employment Opportunity Commission (EEOC) was pending on charges that KSU had discriminated against him on the basis of religion and gender, and that KSU had retaliated

against him. Lapides indicated that at such time as the EEOC had given the proper authorization, he would amend his complaint to add those claims. J.A. 18 (¶ 27).

In his state court complaint, Lapides requested both compensatory and punitive damages, as well as costs and attorneys' fees. J.A. 17-18. Lapides also sought declaratory relief through judicial findings that defamatory material had been placed in his personnel files and had been inappropriately disclosed. J.A. 17 (¶ 26).

2. On April 13, 2000, attorneys for the State of Georgia filed two answers in Cobb County Superior Court, one on behalf of the Regents, J.A. 20, and the other for the individual defendants. J.A. 35. Both answers asserted a panoply of affirmative defenses, including failure to comply with various provisions of the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 *et seq.*, J.A. 23-24, sovereign immunity, J.A. 25; 37, qualified immunity, J.A. 37, and Georgia's Eleventh Amendment immunity. J.A. 25; 37.

On the same day, Georgia's lawyers filed a Notice of Removal in the U.S. District Court for the Northern District of Georgia. J.A. 3; Pet. App. 34a. The notice asserted a right of removal under 28 U.S.C. §§ 1441 & 1446, insofar as Lapides' complaint ostensibly sought recovery under 42 U.S.C. § 1983 and Title VII of the Civil Rights Act, id. § 2000(e) *et seq.* Georgia did reserve any defenses available to it under state and federal law. See J.A. 4, 8; Pet. App. 35a. Georgia also filed the statutorily-required notice in Cobb County Superior Court, staying further proceedings in state court. J.A. 7. This notice indicated that "All Defendants consent to the Removal of this action." J.A. 8.

With its Removal Notice filed, Georgia then sought, on the very same day, to dismiss Lapides' complaint in federal court

under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). See J.A. 48; Pet. App. 37a. The State of Georgia argued that a 12(b)(6) dismissal – a disposition with prejudice – was required on the grounds that Lapides failed to state a claim upon which relief could be granted, or that the defendants variously have "Eleventh Amendment immunity," "qualified immunity," or "are protected by sovereign immunity." J.A. 49; Pet. App. 38a. Additionally, Georgia requested a 12(b)(1) dismissal for lack of jurisdiction over the Title VII claims which, Georgia argued, were not ripe for lack of a "right to sue" letter from the EEOC. In any event, Georgia made clear that it sought the dismissal of the entirety of Lapides' complaint. See J.A. 49; Georgia's Brief in Support of Motion to Dismiss, at 20 ("Defendants respectfully submit that Plaintiff's Complaint is subject to dismissal and request that it be dismissed in its entirety . . . .").

3. Lapides resisted the removal of the case to federal court and sought remand. J.A. 51. After extensive briefing, in which the attorneys for the State of Georgia made certain representations as to their intentions for the litigation, the District Court denied the motion to remand. See Pet. App. 15a-17a. The District Court rejected Lapides' contention that Georgia's filing of an answer in state court somehow precluded removal. Additionally, the fact that Georgia raised its Eleventh Amendment defense in state court, J.A. 25; 37, was strongly indicative, the District Court ruled, that Georgia intended to invoke federal court jurisdiction. See Pet. App. 16a-17a. Finally, relying on this Court's ruling in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381 (1998), the District Court held that "federal courts have jurisdiction to hear a removable case, even though some of the claims in the case may be barred by the Eleventh Amendment." Pet. App. 17a.

The District Court then denied Georgia's Motion to Dismiss on Eleventh Amendment grounds, holding that Georgia

had waived its immunity by removing the case to federal court and then seeking a dispositive ruling on the merits. See Pet. App. 19a-24a. Drawing from this Court's decisions in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), and *Schacht*, the District Court concluded that Georgia's litigation conduct amounted to an "unequivocal" waiver of Eleventh Amendment immunity. Pet. App. 20a-21a. The District Court found that various forms of litigation conduct by state officials – including removal of cases to federal court – constituted a valid waiver, irrespective of the authority of those officials under state constitutions or statutes to waive the Eleventh Amendment bar. See Pet. App. 21a; 23a-24a. The District Court also relied upon this Court's precedents that a state's voluntary intervention in a federal case to assert its own claim amounted to a waiver of the Eleventh Amendment. See Pet. App. 21a (citing *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883); *Missouri v. Fiske*, 290 U.S. 18, 24-25 (1933); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276 (1959)).

Although the District Court denied Georgia's Motion to Dismiss on Eleventh Amendment grounds, it did grant dismissal on Lapides' section 1983 claims against the two named defendants in their personal capacities. Pet. App. 25a-27a. The District Court specifically ruled, however, that Lapides' official capacity claims against defendants Rugg and Covin would survive dismissal. Pet. App. 27a-28a. The remainder of Georgia's grounds for dismissal, including its suggestion that Lapides' Title VII claim was barred, were rejected.[1] See Pet.

[1] In a motion filed after the District Court's ruling on Georgia's Eleventh Amendment immunity, the named defendants sought dismissal of Lapides' state law claims against Rugg and Covin in their personal (continued...)

App. 18a-19a.[2]

4. Georgia took an interlocutory appeal from the District Court's ruling that it had waived its Eleventh Amendment immunity, and the Court of Appeals reversed. Pet. App. 1a. The Court of Appeals held that, under Georgia's Constitution, no authorization had been granted to the state's attorneys to waive Eleventh Amendment immunity. The panel regarded this as consistent with this Court's holding in *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 467 (1945). See Pet. App. 4a-6a.

Despite its conclusion, the Court of Appeals appeared perplexed by Georgia's litigation posture in this case. See Pet. App. 8a-9a ("[W]e are also troubled by the seemingly inconsistent positions of the State by both asserting that the federal courts have jurisdiction to obtain removal, while simultaneously arguing with equal force that the federal courts do not have authority to hear the claims because of Eleventh Amendment immunity . . . ."); App. 10a-11a & n. 4 ("[T]he State removed to theoretically take advantage of our superior knowledge of the federal questions involved in the case. . . .

[1](...continued)
capacities. The district court ruled that those claims would be dismissed because they were covered under the Georgia Tort Claims Act and that Lapides had failed to comply with the *ante-litem* notice requirement of the GTCA. O.C.G.A. § 50-21-26(b). This ruling, affirmed on appeal, has no bearing on the § 1983 claims against Rugg and Covin in their official capacities. Nor does it, under its terms, affect the state law claims against the Regents.

[2] Lapides subsequently secured a "right to sue" letter from the EEOC on his Title VII claims. In September 2001, he filed a separate action in federal court on these counts, which are not otherwise before this Court in this proceeding.

This is, in fact, what the State argues in its brief for this case. Therefore, we proceed based on their arguments and disregard the possibility that the assertion of sovereign immunity may in fact lead to a situation in which there are no claims over which the federal courts have jurisdiction.").

The Court of Appeals reversed and remanded to the District Court, which was "instructed to hear only those non-barred claims over which it has jurisdiction and remand the others to state court. If no such non-barred federal questions exist, the whole case is to be remanded to state court." Pet. App. 11a. The Court of Appeals did not, however, ascertain whether any of Lapides' claims would survive Georgia's assertion of Eleventh Amendment or other sovereign immunity defenses.

5. A timely Petition for Writ of Certiorari followed, which this Court granted on October 29, 2001.

SUMMARY OF THE ARGUMENT

Georgia relinquished its Eleventh Amendment immunity when it invoked federal court jurisdiction by removing this case. This conclusion follows from the unique nature of waivers of the Eleventh Amendment bar by a state's litigation conduct. Unlike situations where a state is alleged to have waived the Eleventh Amendment by its statutes of general application or by accepting the conditionalities of federal funding, forfeitures by way of litigation conduct are an express and particular manifestation of a state's consent to federal court jurisdiction. In such cases the proper standard for waiver is whether the state "voluntarily invoked" federal court jurisdiction or made "a 'clear declaration' that it intends to submit itself to the

[jurisdiction of the federal courts]." *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999) (citing *Gunter v. Atlantic Coast R. Co.*, 200 U.S. 273, 284 (1906), and quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)). Such a standard is consistent with this Court's articulated concerns as to the dignity interest vindicated by the Eleventh Amendment, and also the unique and hybrid nature of Eleventh Amendment immunity as waiveable by states. See id. at 675.

A formidable line of this Court's decisions confirm that states forfeit their Eleventh Amendment immunity when they invoke federal jurisdiction. This rule originated in *Clark v. Barnard*, 108 U.S. 436 (1883), holding as an elemental proposition that the Eleventh Amendment "is a personal privilege which [a state] may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction." Id. at 447. This rule was endorsed in *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906) ("[W]here a state voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment."), and in *Missouri v. Fiske*, 290 U.S. 18, 25 (1933). These rulings have been confirmed in the Court's recent Eleventh Amendment jurisprudence. See *College Sav. Bank*, 527 U.S. at 675-76 (a federal court "will find a waiver . . . if the State voluntarily invokes [its] jurisdiction.") (citing *Gunter*, 200 U.S. at 284), 681 n.3; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997). That the Eleventh Amendment bar may be lifted by a state's invocation of federal jurisdiction is consistent also with the textual thrust of the Amendment which prohibits "suit[s] . . *commenced or prosecuted* against a State" in federal court. U.S. CONST. Amend. XI (emphasis added).

Removal is an exceptional form of litigation conduct that invokes federal court jurisdiction. Provisions of the removal statute ensure that a state's removal of an action will be voluntary and knowing. Removal *always* requires a state defendant's consent, even when it stands amongst a number of defendants. See 28 U.S.C. § 1446(a). The removal statute serves clear notice to states that removal has significant legal consequences, and is not to be entered into lightly. See id. (cross-referencing FRCP 11). When a state removes a case to federal court, it thus constitutes a waiver of the forum immunity the state would otherwise have to the adjudication of the causes of action contained in the plaintiff's complaint. However, the state retains in federal court all other immunities it would otherwise legitimately possess. If a state is not prepared to unconditionally and fully submit to federal jurisdiction, it should not be allowed to remove a case and later withdraw its consent.

That a state lifts the Eleventh Amendment bar when it removes a case is not necessarily inconsistent with the requirement of *Ford Motor Co. v. Department of Treas. of Indiana*, 323 U.S. 459 (1945), that the official waiving the state's Eleventh Amendment immunity be properly authorized to do so under state law. *Ford Motor* can be critically distinguished on a number of grounds, not the least of which is that the decision does not deal with situations where the state actually invokes the jurisdiction of the federal courts. See id. at 466-67. In such situations, this Court has suggested that the proper analysis is whether the particular state official had the authority to invoke federal jurisdiction. See *Gunter*, 200 U.S. at 285-86; *Gardner v. New Jersey*, 329 U.S. 565, 575 (1947). *Ford Motor* may be also an unreliable guidepost in the domain of this Court's new Eleventh Amendment jurisprudence,

especially with the demise of constructive waivers. Lastly, the rule of *Ford Motor* — if it is to be applied at all — must necessarily be tempered by such federal law considerations of judicial estoppel and other equitable concerns where a state purports to assert federal jurisdiction and then later disavows that choice.

ARGUMENT

STATES WAIVE THEIR ELEVENTH AMENDMENT IMMUNITY WHEN THEY REMOVE CASES TO FEDERAL COURT

A. Forfeitures of Eleventh Amendment Immunity By a State's Litigation Conduct Are Distinct From Other Types of Waivers

1. The type of waiver raised in this case is one resulting from the litigation behavior of states in invoking the jurisdiction of the federal courts, foregoing the immunity conferred by the Eleventh Amendment. Such a forfeiture of the forum immunity that states otherwise enjoy in federal proceedings is quite distinct from other types of waivers that states may make in expressing their consent to federal court jurisdiction. Where, as here, a state actually invokes federal jurisdiction by removing a case from state court to federal court, that is as clear and manifest an expression of the state's willingness to submit itself to the judgment of the federal courts as might be imagined.

The kind of waiver implicated here is thus not one contained in a state statute of general application. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985);

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984); *Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam). Nor does this case arise from the conditionalities of Congressional funding for federal programs and activities. See *South Dakota v. Dole*, 483 U.S. 203 (1987). Neither is it suggested here that a state's course of dealing in a Congressionally-regulated marketplace constitutes an implied waiver of the state's Eleventh Amendment immunity, as in the now-discredited doctrine of *Parden v. Terminal Railway of the Alabama State Docks Dep't*, 377 U.S. 184, 191-92 (1964). See *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999).

Rather, when a state engages in specific litigation tactics in relation to a particular case or controversy, there are correspondingly high indicia of the state's intention to waive Eleventh Amendment immunity and to submit that dispute to a federal court's determination. One need not speculate as to the effect of a state statute of general application to a (probably) uncontemplated, future litigation. Nor need a court concern itself with a troublesome Hobson's choice when a state is confronted with the dilemma of accepting federal funds in exchange for prospective waivers of Eleventh Amendment immunity. A state's own litigation conduct — the product of voluntary choices as how to best achieve its litigation objectives — instead presents the clearest possible picture of the state consent needed to lift the Eleventh Amendment bar on federal court adjudication of disputes between private parties and states. See *College Sav. Bank*, 527 U.S. at 680 (federal courts need to be certain that "the State in fact consents to suit.").

In this sense, waivers by litigation conduct are also distinct from the generalized situation of constructive waiver mentioned in *Parden*, and now thoroughly repudiated by this Court in *College Savings Bank*. Such constructive waivers

ostensibly arose when a state performs some act that, based on the surrounding circumstances, would lead a court to believe that it has waived its immunity. See id. at 681-82 (discussing *Parden*, 377 U.S. at 192-96). When a state engages in the pursuit of its litigation objectives in a case, and particularly when such choices involve the actual invocation of federal court jurisdiction, there is nothing "constructive" about the waiver or forfeiture of the state's constitutionally protected privilege of forum immunity in federal tribunals. It is, instead, as express a sort of immunity waiver as can be envisaged.

2. Petitioner is mindful of the heightened standard of intent for state waivers of Eleventh Amendment immunity. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985) ("a State will be deemed to have waived its immunity 'only where stated "by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." '" Id. (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909))). *Atascadero* also cautions that "we require an unequivocal indication that the State intends to consent to federal [court] jurisdiction that otherwise would be barred by the Eleventh Amendment." Id. at 238 n.1.

Nonetheless, the standard articulated in *Edelman* and *Atascadero* arose in relation to state constitutional provisions or statutory enactments, and not the situation of particularized litigation conduct in relation to a specific case. The *Edelman-Atascadero* benchmark for forfeitures of Eleventh Amendment immunity may not necessarily be appropriate in situations of waiver by litigation conduct, but even if such a heightened standard is employed, a state's removal of an action to federal court clearly constitutes an "express," "unequivocal," and "overwhelming" intent to forego Eleventh Amendment

immunity. Indeed, in *Edelman*, the Court refers to a heightened standard for waiver in relation to the principle that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights . . . ." 415 U.S. at 673. Waivers by litigation behavior, especially a state's affirmative invocation of federal court jurisdiction, are evidence of "express" and not merely "constructive" consent.

This Court has more recently observed in *College Savings Bank* that a state may waive its Eleventh Amendment immunity by either "voluntarily invok[ing]" federal court jurisdiction *or* making "'a clear declaration' that it intends to submit itself to the [jurisdiction of the federal courts]." 527 U.S. at 675-76 (citing *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906), and quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)). This may be a more authoritative statement of law in regard to waivers by litigation conduct. The Court's emphasis in *College Savings Bank* on Eleventh Amendment immunity as being a "personal privilege which [a state] may waive at pleasure," id. at 675 (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)), confirms this view. Some forms of litigation tactics — particularly (as in this instance) a state removing a case from state court to federal court — would certainly qualify as either "voluntarily invok[ing]" federal court jurisdiction or a "clear declaration that a state intends to submit itself" to federal court jurisdiction.

3. Waivers by a state's litigation behavior are also consonant with this Court's observation that "[t]he principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign." *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944). This Court's concern in *Read* with "mitigat[ing]" the "rigors" of

Eleventh Amendment immunity was no mere rhetorical flourish. Rather, the consideration in *Read* was that states occasionally will choose to waive their immunity, and one of the ways they will manifest that choice is by pursuing a litigation strategy that takes them into federal court in the capacity of plaintiff, claimant, intervenor, or defendant. In such circumstances, as this Court intimated in *Read*, it would be proper to balance the Eleventh Amendment's significant federalism concerns in liberating state governments from potential federal court interference with the countervailing interest of states being able to contest cases with individuals in federal court on the basis of mutual equality and respect. See also *Poindexter v. Greenhow*, 114 U.S. 270, 286 (1885) ("This immunity from suit secured to the states, is undoubtedly a part of the constitution of equal authority with every other, but no greater, and to be construed and applied in harmony with all the provisions of that instrument.").

Additionally, a rule which has states waiving their Eleventh Amendment immunity by voluntarily submitting to federal court jurisdiction is fully consistent with the dignity interest that is supposed to be vindicated by the Eleventh Amendment. See *In re Ayers*, 123 U.S. 443, 505 (1887); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Hess v. Port Authority Trans-Hudson*, 513 U.S. 30, 39-40, 52 (1994); but see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821) ("We must ascribe the amendment, then, to some other cause than the dignity of a State.") (Marshall, C.J.). Obviously, when a state itself affirmatively invokes federal court jurisdiction (through removal) it cannot be said to have been subjected to the coercive process of federal courts at the instance of private parties. State dignity would, consequently, not be impaired by this Court's recognition of certain waivers of Eleventh Amendment immunity by virtue of a state's purposeful litigation

behavior.

4. Lastly, waivers by litigation conduct need not necessarily contradict this Court's holdings that Eleventh Amendment immunity may be asserted by a state at any point in a case. See *Ford Motor Co. v. Dep't of Treas. of Ind.*, 323 U.S. 459, 467 (1945) (holding that Eleventh Amendment immunity may be asserted for the first time on appeal); *Edelman*, 415 U.S. at 678; *Fla. Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982); *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998); cf. *Schacht*, 524 U.S. at 389, 393-94 (Kennedy, J., concurring). By the same token, this Court has held that the Eleventh Amendment bar does not need to be considered by a court sua sponte as a subject-matter limitation on the jurisdiction of federal courts. See *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 515 n.19 (1982); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997); *Schacht*, 424 U.S. at 389 ("Nor need a court raise the [Eleventh Amendment] defect on its own. Unless the State raises the matter, a court can ignore it.") (Breyer, J., for the Court) (citing *Patsy*). The hybrid nature of the forum immunity conferred by the Eleventh Amendment is problematic and has certainly been recognized in this Court's jurisprudence. See *Schacht*, 524 U.S. at 394 (Kennedy, J., concurring).

There is a clear tension between a characterization of Eleventh Amendment immunity that can be both waived by a state and raised at any time in the state's discretion. But for purposes of the present case, the Court need not reach some definitive conclusion in resolving this ostensible paradox. It suffices for this Court to rule that certain litigation behavior will act as such a clear indication of a state's invocation of federal jurisdiction, or of a voluntary submission to federal judicial power, that such conduct will serve as an automatic forfeiture of the state's forum immunity conferred by the Eleventh

Amendment. In such circumstances, a state should properly be found to have itself lifted the Eleventh Amendment bar.

B. **This Court's Decisions, as Well as the Constitution's Text, Indicate That a State's Invocation of Federal Court Jurisdiction is a Waiver of Eleventh Amendment Immunity**

1. A long line of this Court's authority indicates that where a state affirmatively and voluntarily invokes federal court jurisdiction, the state foregoes its Eleventh Amendment immunity. This sturdy thread of cases has run throughout the changing tapestry of this Court's Eleventh Amendment and federalism jurisprudence. It remains a reliable guide for this Court in the resolution of the specific issue raised here: whether a state foregoes its Eleventh Amendment immunity when it removes a matter from state court to federal court.

a. The locus classicus of this rule of waiver through state litigation conduct is a sequence of three cases, beginning with *Clark v. Barnard*, 108 U.S. 436 (1883). This case arose when Barnard, representing the assignees-in-bankruptcy of a failed railroad, sought to block the State of Rhode Island, acting through its general treasurer, Clark, from disposing of some of the railroad's debentures. Barnard brought suit in the U.S. Circuit Court for the District of Massachusetts. Clark answered the bill in equity with a demurrer, challenging the jurisdiction of the federal court based on the Eleventh Amendment bar. See id. at 445. The demurrer was denied, and Rhode Island subsequently made a claim to funds in the custody of the court, and then answered the bill by raising both substantive defenses and Eleventh Amendment immunity. See id.

The first question considered by this Court in *Clark* was whether the suit was blocked by the Eleventh Amendment. Justice Matthews, writing for the Court, noted that "[w]e are relieved, however, from its [the Eleventh Amendment's] consideration by the voluntary appearance of the State in intervening as a claimant of the fund in court." Id. at 447. The Court went on to hold, as an elemental proposition, that the Eleventh Amendment

> is a personal privilege which [a state] may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction. . . . Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the state and the appellees to the fund, to which both claimed title.

Id. at 447-48.

So in *Clark*, Rhode Island's appearance to make a claim in the proceeding, even with a demurrer premised on a jurisdictional bar, constituted a waiver of Eleventh Amendment immunity. See id. at 448. The Court observed that the state's invocation of a federal forum – in this instance to compete for part of a bankruptcy fund – distinguished it from earlier cases, such as *Georgia v. Jesup*, 106 U.S. 458, 462 (1882), "where the State expressly declined to become a party to the suit, and appeared only to protest against the exercise of jurisdiction by the court." *Clark*, 108 U.S. at 448. Having found that Rhode

Island had waived its Eleventh Amendment immunity, the Court proceeded on the merits to give a judgment to the state. See id. at 461.

The rule in *Clark* was endorsed in *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273 (1906). While this case essentially involved injunctive relief against a state, one issue considered by the Court in *Gunter* was the effect of an earlier litigation, *Humphrey v. Pegues*, 83 U.S. (16 Wall.) 244 (1872), and whether South Carolina had voluntarily submitted in that case to the jurisdiction of the federal courts. The Court concluded in *Gunter* that South Carolina had, through its designated officers, invoked federal court jurisdiction and that it was bound by the earlier ruling. The Court also held that "where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Gunter*, 200 U.S. at 284 (citing *Clark*, 108 U.S. at 447). And, in a ruling that will be significant for Petitioner's subsequent discussion of the authority of state officers to invoke federal court jurisdiction by removing actions, see *infra* at 38, this Court intimated that South Carolina could not seek to disclaim the authority of its Attorney General to have participated in the earlier *Pegues* proceedings. See id. at 289.

The final case in this initial triptych is *Missouri v. Fiske*, 290 U.S. 18 (1933). This controversy arose when Missouri intervened in a federal court case, not on the merits, but merely to prevent the distribution of certain assets of an estate prior to the completion of a Missouri probate proceeding in which the state was contending that the assets needed to be included in the decedent's estate. After the state intervened, private parties in the federal court suit sought an injunction against Missouri to prevent it from pursuing its claim against the assets in the

probate court. See id. at 21. This Court articulated the applicable law in these terms:

> The first question is whether the State has waived the immunity it now claims. Immunity from suit under the Eleventh Amendment is a personal privilege which may be waived. *Clark v. Barnard*, 108 U.S. 436, 447, 448; *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284. It may be waived by a voluntary proceeding in intervention (*Clark v. Barnard*, supra) and the question is as to the effect of the State's application to intervene in this suit.

Id. at 24.

This Court went on to rule, however, that Missouri's intervention as a party defendant in the federal proceeding was, based on the specific relief sought by the state, too limited to qualify as a waiver of the Eleventh Amendment bar. See id. at 25. "As only a 'temporary impounding' was sought, which was 'in no sense a matter of right, but rather partakes of grace,' the court concluded that the intervention was too limited in character to constitute a waiver of the immunity given by the Amendment, if that immunity would otherwise exist." See id. The Court nonetheless was emphatic about the legal consequences of a state invoking federal court jurisdiction:

> If the State chooses to come into the court as plaintiff, or to intervene, seeking the enforcement of liens or claims, the State may be permitted to do so, and in that event its rights will receive the same consideration as those of other parties in interest. But when the State does not come in and withholds its consent, the court has no authority to issue process against the State to compel it to subject itself to the court's judgment, whatever the nature of the suit.

Id. at 28 (citations omitted). And while the *Fiske* Court emphasized the role of a state as a plaintiff or intervenor – which, of course, would have been the context for Missouri's action in the federal proceeding contesting the probate court's actions – its logic equally is applicable to cases where a state removes an action from state court to federal court.

b. The trilogy of *Clark*, *Gunter* and *Fiske* cover many scenarios in which state litigation conduct was deemed to be a waiver of Eleventh Amendment immunity. But whether the state was a claimant contesting a share of an estate, or as an intervenor to determine its taxing authority, or as a plaintiff actually seeking affirmative relief against a private party, this Court ascertained a broader principle: that when a state itself seeks federal court jurisdiction, it cannot later raise an Eleventh Amendment bar to that adjudication.

This Court has reaffirmed the rule that certain kinds of litigation conduct engaged in by state attorneys will be deemed a waiver. In *Gardner v. New Jersey*, 329 U.S. 565 (1947), a state's filing a proof of claim in bankruptcy was held to forfeit the state's Eleventh Amendment immunity. The Court in *Gardner* specifically explained:

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. If the claimant is a State, the procedure of proof and allowance is not transmuted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*. It is none the less such because the claim is rejected *in toto*,

> reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash. When the State becomes the actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim. See *Clark v. Barnard*, 108 U.S. 436, 447-448; *Gunter v. Atlantic Coast Line*, 200 U.S. 273, 284-289; *Missouri v. Fiske*, 290 U.S. 18, 24-25.

Id. at 573-74 (other citations omitted); see also *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933).

Lest Georgia suggest that the rule of *Clark* and its progeny is merely an obscure aspect of federal bankruptcy jurisdiction (notwithstanding the non-bankruptcy contexts of *Gunter* and *Fiske*), without any wider Eleventh Amendment relevance, it would do well to observe the broader applications of the principle. In *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), the Court approvingly cited *Clark* and *Fiske*, and held that "a State may waive [Eleventh Amendment immunity] at its pleasure . . . as by a general appearance in litigation in a federal court . . . ." Id. at 276. These cases thus stand for a more far-reaching proposition than their bankruptcy or intervention contexts would otherwise suggest. See also *Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 473 (1987) ("If a State waives its immunity and consents to suit in federal court, the suit is not barred by the Eleventh Amendment.") (citing *Clark v. Barnard*, 108 U.S. 436, 447 (1883)).

c. Lastly, and most importantly for our present purposes, *Clark* and its progeny have not only survived intact the application of this Court's recent Eleventh Amendment jurisprudence, but have been singled out for approbation and continued vitality. Indeed, this Court as recently as two years

ago sweepingly endorsed the notion that states can waive their Eleventh Amendment immunity by engaging in certain litigation behavior:

> *Gardner v. New Jersey* . . . held that a bankruptcy court can entertain a trustee's objections to a claim filed by a State, [and] stands for the *unremarkable* proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts.

College Sav. Bank, 527 U.S. at 681 n.3 (citation omitted) (emphasis added). Moreover, this Court noted in the same case that a federal court "will find a waiver . . . if the State voluntarily invokes [its] jurisdiction." Id. at 675-76 (citing *Gunter*, 200 U.S. 273, 284 (1906)).

These sentiments were certainly echoed by both the majority and the concurrence in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381 (1998). The Court noted that "[a] State can waive the [Eleventh Amendment] defense." Id. at 389 (citing *Clark*, 108 U.S. at 447). Justice Kennedy observed in his concurrence that

> [i]n permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. . . . Even if appearing in federal court and defending on the merits is not sufficient to constitute a waiver, a different case may be presented when a State under no compulsion to appear in federal court voluntarily invokes its jurisdiction. . . . Since a State which is made a defendant to a state-court action is under no compulsion to appear in federal court and, like any other defendant, has the unilateral right to block removal of the case, any appearance the State makes in federal court may well be regarded as voluntary in the same manner as the appearances which gave rise to the waivers in *Clark* and *Gardner*.

524 U.S. at 394-96 (Kennedy, J., concurring) (discussing *Gardner* and *Clark*). See also *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997) ("a State can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it").

2. This line of decisions conclusively establishes the point that when states invoke federal court jurisdiction, they forfeit any forum immunity they would otherwise possess under the Eleventh Amendment. But this proposition also has some support in the textual thrust of the Eleventh Amendment itself, which is concerned with "suit[s] . . . *commenced or prosecuted* against" a State. U.S. CONST. Amend. XI (emphasis added).

Petitioner is, of course, mindful that this Court's Eleventh Amendment jurisprudence has, to a considerable degree, been concerned with identifying the Adopters' expectations as to state sovereign immunity, and has thus been less preoccupied with textual considerations for the Amendment. See Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989). This Court has manifestly regarded it as proper to include within the ambit of the Amendment's interpretation classes of cases that are textually omitted. See, e.g., *Hans v. Louisiana*, 134 U.S. 1, 10-17 (1890) (Eleventh Amendment barred a suit by a citizen against her own state in federal court); *In re New York (Petition of Walsh)*, 256 U.S. 490, 497-98 (1921) (Amendment applies to actions in admiralty, despite the text mentioning only "suit[s] in law or equity"). But such an interpretive methodology is not the same as reading words *out* of the text of the Eleventh Amendment.

In the original framing of the Amendment by the Third

Congress, the "commenced or prosecuted" language that found its way into the adopted text had some apparent significance. The apparent purpose of this provision clearly was to reverse the Supreme Court's ruling in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), as well as to go a step further and insulate states from any process brought at the instance of an individual in a federal court.[3] The apparent redundancy of "commenced or prosecuted" may thus have been an effort to cover possible forms of action in law or equity that might be initiated against a state, as well as the (perhaps) more remote contingency of quasi-criminal proceedings. In any event, however, the adopted text of the Amendment was narrower in scope than the proposal made by some Members of Congress and some state legislatures to categorically prevent states from "being made a party defendant" in federal court. PA. J. & WKLY. ADVERTISER, Feb. 27, 1793, at col. 2 (proposal of Rep. Sedgwick).[4]

[3] An alternative proposal that was made by Rep. Theodore Sedgwick of Massachusetts would have specifically indicated that "no state shall be liable to be made a party defendant in any of the judicial courts [of the United States] . . . ." PA. J. & WKLY. ADVERTISER, Feb. 27, 1793, at col. 2, quoted in William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1058-59 & n.116 (1983); see also Doyle Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 226 & n.73 (1968). All of the other proposed texts — including three others made in the Senate, 4 Annals of Cong. 25 (1794) (made on Jan. 2, 1794 by an undisclosed Senator, which ultimately was the final text of the adopted Amendment); id. at 30 (proposal by Sen. Gallatin); id. at 30 (proposal by an unknown Senator) — employed the "commenced or prosecuted" phrase, or just the word "prosecuted."

[4] See RESOLVES OF THE GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 28, 31-32 (1793) (resolution calling for an amendment (continued...)

It is thus certainly open to question whether the Amendment is even textually implicated when a state removes an action to federal court. Obviously, in such circumstances the suit was originally "commenced or prosecuted" against the state in *state* court. It was only by virtue of the state's removal that it found its way to federal court. In cases where a state has commenced proceedings originally in federal court, this Court has held that the Eleventh Amendment does not insulate the states from the consequences of their litigation decisions. In *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809), this Court, Chief Justice Marshall writing, noted

> It is contended [by the Commonwealth of Pennsylvania] that the federal courts were deprived of jurisdiction in this cause, by that amendment of the constitution which exempts States from being sued in those courts by individuals. . . . The right of a State to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of the United States, is not affected by [the Eleventh] amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested.

Id. at 139. This principle consistently has been renewed in Eleventh Amendment cases. See *In re the Regents of the Univ. of Calif.*, 964 F.2d 1128, 1135 (Fed. Cir. 1992); *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1148 (4th Cir. 1997) (the Eleventh Amendment "presents no bar to a state

[4](...continued)
that would clarify that a state "should [not] be held liable to answer on compulsory civil process"); 1793 Va. Acts ch. 52; 1 STATUTES AT LARGE OF VIRGINIA, 1792-1806, at 284 (1835) (states shall not "be made a defendant at the suit of any individual or individuals").

affirmatively entering a federal forum voluntarily to pursue its own interest."). See also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 405 (1821) (Supreme Court is empowered to review a question of federal law arising from a state court decision).

Whether this Court views a state's waiver of the Eleventh Amendment bar by its affirmative invocation of federal court jurisdiction through the lens of the Amendment's text, or through the optic of this Court's well-elaborated, consistent case law (beginning with *Clark* and culminating with *College Savings Bank*), the result is the same. Such an invocation is the most express form of waiver or forfeiture of Eleventh Amendment immunity. To hold that states cannot waive their forum immunity in federal court by voluntarily invoking that jurisdiction would do violence to the text of the Amendment and over a century of this Court's case law.

C. Removal Unambiguously Evinces a State's Voluntary Consent to Federal Court Jurisdiction

What remains to establish is whether removal is such a clear form of litigation conduct in invoking federal jurisdiction, so as to constitute a manifest forfeiture of the state's Eleventh Amendment immunity. Petitioner submits that it is, based on the particularly voluntary and consensual aspects of removal procedure, as well as other considerations that give the appropriate respect to the state's sovereign interests in pursuing litigation into federal court via removal.

1. While the federal statutory basis of removal is certainly not dispositive, some factors related to the status of that procedure may weigh on the Court's decision in this case. These statutory factors speak both to the voluntariness of a

state's removal action, as well as the degree of knowledge and care a state can be assumed to be exercising in making the removal.

a. The first, and most important, consideration is that removal always would require the voluntary consent of a defendant state, even when it stands amongst a panoply of private defendants. See 28 U.S.C. § 1446(a) ("a defendant *or defendants* desiring to remove any civil action . . . .") (emphasis added). This was confirmed by this Court in *Chicago, Rock I. & Pac. Ry. v. Martin*, 178 U.S. 245, 248 (1900), and *Gableman v. Peoria, D. & E. R. Co.*, 179 U.S. 335 (1900), and subsequently has never been the subject of any doubt. There can thus be no instance in which a case can be removed to federal court without the active consent and voluntary action of a defendant state.

In this regard, Georgia might contend that in *College Savings Bank*, this Court held that the voluntariness of waiver is destroyed when the state is forced to choose between refusing to waive immunity and the exclusion from a lawful activity. See 527 U.S. at 687. Therefore, it might be intimated that a waiver of immunity would be involuntary in a case in which the state is forced to choose between the forum of its choice and immunity. But this Court should be, as was the Eleventh Circuit, "reluctant to base any part of [a] holding on that ground, for it seems that both plaintiff and defendant are mutually excluded from the federal forum in that scenario and thus no strategic or other disadvantage is evident." Pet. App. 11a n.5.

To suggest that states are placed in a Hobson's choice by requiring them to waive their Eleventh Amendment immunity when they remove a case or otherwise affirmatively invoke federal court jurisdiction is without merit. "[C]alling upon a federal court's jurisdiction is fundamentally different, for

purposes of the Eleventh Amendment, from merely conducting commercial activity." *Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico*, 270 F.3d 17, 26 (1st Cir. 2001). It is also evident that "the Eleventh Amendment . . . does not ensure a state the choice of a desirable alternative." Id. at 29. A state's invocation of federal court jurisdiction by removing a matter to federal court is certainly voluntary insofar as a state is choosing among a set of litigation strategies, including keeping the case in state court.

b. States are also on notice that removing a case has significant legal consequences, even apart from forfeiture of Eleventh Amendment immunity. 28 U.S.C. § 1446(a) provides that:

> A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

28 U.S.C. § 1446(a).[5] Not only does this provision require a high degree of acuity by counsel in drawing up removal papers — calling for "a short and plain statement of the grounds for removal" — it also demands a certification under FRCP 11 that

[5] An earlier version of this provision, 28 U.S.C. § 76 (1940), required that counsel certify that she has examined the proceedings and carefully inquired into all matters set forth in the petition and believes them to be true. This requirement was omitted as unnecessary and inconsistent with FRCP 11, when the statute was amended in 1988 to its current form.

> a pleading, written motion, or other paper . . . to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —
>
> (1) . . . is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . . .

Fed. R. Civ. P. 11.

The possibility that an attorney representing a state will remove a case under these provisions, and yet purport to believe that the action has no legal consequences insofar as voluntarily and knowingly accepting the jurisdiction of the federal court, stretches credulity beyond the breaking point. Obviously, to the extent that Georgia's Attorney General is constitutionally and statutorily authorized to handle civil litigation for the state, GA. CONST. Art. 5, § 3, ¶ 4 ("The Attorney General . . . shall represent the state . . . in all civil and criminal cases in any court . . . "); O.C.G.A. § 45-15-3(6) ("It is the duty of the Attorney General . . . to represent the state in all civil actions tried in any court . . . ."), he and his delegated staff must accept the consequences of their litigation conduct. See *Missouri v. Jenkins*, 491 U.S. 274, 279 (1989) (state attorneys not immune from civil contempts or sanctions); *Derechin v. State Univ. of New York*, 963 F.2d 513, 517-18 (2d Cir. 1992) (state attorneys not immune under Eleventh Amendment for FRCP 11 sanctions). Similarly, there is the long-recognized rule that where a principal's attorney (here the Attorney General of Georgia on behalf of the state) enters an appearance in a

proceeding, that constitutes a submission to the jurisdiction of that court. See *French v. Hay*, 89 U.S. (22 Wall.) 238 (1874); *Habic'. v. Folger*, 87 U.S. (20 Wall.) 1 (1873); *Washington, A & G.R. Co. v. Brown*, 84 U.S. (17 Wall.) 445 (1873); *New Jersey v. New York*, 31 U.S. (6 Pet.) 323 (1832).

The combined due diligence and certification requirements of 28 U.S.C. § 1446(a) and FRCP 11, strongly suggest that states are under the necessary notice that removal of a case to federal court is not to be regarded as a casual act. As Justice Kennedy commented in his concurrence in *Schacht*,

> [i]f the States know or have reason to expect that removal will constitute a waiver, then it is easy enough to presume that an attorney authorized to represent the State can bind it to the jurisdiction of the federal court (for Eleventh Amendment purposes) by the consent to removal.

524 U.S. at 397 (Kennedy, J., concurring). The very structure and safeguards of the removal procedure thus ensure that a state's removal notice will be filed voluntarily, and only after the appropriate care has been taken by the state's attorneys to evaluate the state's litigation strategy. The possibility of inadvertent removal of a case by a state is thus farfetched speculation.

2. When a state removes a case to federal court, it constitutes a waiver of the forum immunity the state would otherwise have to the adjudication of the causes of action contained in the plaintiff's complaint. This conclusion comes with significant caveats, which bear on the appropriate balance to be struck in protecting a state's dignity interests in the ensuing federal court litigation. These admonitions are also consistent with the concern that a rule of waiver of Eleventh Amendment immunity, where a "State consents to removal [, should not] put States at some unfair tactical disadvantage."

Schacht, 524 U.S. at 397-98 (Kennedy, J., concurring).

Petitioner is not suggesting that a plaintiff's subsequent amendments to a complaint would be covered by a defendant state's removal action as a waiver, although any counter-claims pled by a state certainly would be. A state thus would not be held to have waived its Eleventh Amendment immunity to causes of action or remedial requests first raised after the removal, absent some additional indication of voluntary consent (assuming that such additional claims or remedies are even subject to the Eleventh Amendment bar). Federal courts obviously would have the power to prohibit such after-added claims. See 28 U.S.C. §§ 1441(c); 1447(a) & (e).

Nor is Petitioner insinuating that states may not, when they remove cases, preserve any common-law or statutory sovereign immunities they otherwise possess. In this case, Georgia is thus free to argue to the federal district court principles of (i) qualified immunity (on behalf of the individual defendants sued in their personal capacity); (ii) the limits of the Georgia Tort Claims Act (GTCA), O.C.G.A. § 50-21-20 *et seq.*, which conditions the state's waiver of immunity in tort cases; and (iii) any residual common law sovereign immunities it might have. Georgia properly preserved these defenses in its answers, see J.A. 23-25; 37, and, in fact, argued these claims before the district court. See Pet. App. 24a-28a.

But what states are waiving by removal is their forum immunity to federal court adjudication of the causes of action and corresponding remedies contained in the complaint. Where, as here, a state removes a case to federal court and then seeks a dispositive ruling on the merits by filing a Rule 12(b)(6) motion, see J.A. 49; Pet. App. 38a, it is beyond cavil that the state voluntarily invokes the jurisdiction of the federal courts, and should not be suffered to later protest that its attorneys lacked

the necessary authority to effectuate such a waiver. In short, although Georgia is free to press its other sovereign immunity defenses before the federal court, it is not at liberty to withdraw its consent to federal jurisdiction in the event a court rejects those defenses.

These caveats are entirely consistent with this Court's ruling in *Schacht* that the presence in a removable case of an Eleventh Amendment-barred claim does not destroy removal jurisdiction that would otherwise exist, and federal courts may proceed to hear the non-barred claims. See 524 U.S. at 392-93. The categorical rule of waiver that Petitioner advances here – that states forfeit the forum immunity granted by the Eleventh Amendment when they remove a case to federal court – would be vastly superior to the *ad hoc* test propounded by the Eleventh Circuit below. See Pet. App. 11a & n.4. That formula vaguely sought to distinguish barred from non-barred claims, even as Georgia originally had sought to dismiss the entirety of the case from federal court on Eleventh Amendment and other sovereign immunity grounds. See J.A. 49; Pet. App. 38a. This Court has thus noted that "a federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 121; see also 28 U.S.C. § 1441(c).

A categorical rule of waiver by removal would vastly simplify the choices that states make in planning their litigation strategies. There would be no risk of bifurcation of claims or remedies, or of accidental invocations of federal court jurisdiction on the mistaken premise that some claims would be subsequently remanded. But even if states insist on a privilege of removing cases to federal court and then seeking dismissals on Eleventh Amendment grounds, it may be legitimately wondered whether such a conditional act is a proper removal within the meaning of sections 1441 and 1446. In short, a state

must be consistent in its litigation strategy: maintain the private parties' undivided action in state court, or unconditionally submit the entire case to federal jurisdiction.

3. Finally, it is worth noting that this Court's decision in this case need not concern itself with other forms of litigation conduct that might give rise to clear waivers of Eleventh Amendment immunity. Removal of an action to federal court manifestly constitutes litigation conduct which has that effect. While a state's filing of proofs of claim in bankruptcy (see 11 U.S.C § 106 (b)) or in admiralty (see FRCP Supp. Rules B & C), raise similar issues of invoking federal court jurisdiction, the additional feature of a state asserting priority to a res, may distinguish such cases. It is instructive that the vast majority of lower court cases involving bankruptcy have found a waiver by a state upon filing a proof of claim, without reference to the authorization of the state officer filing such a claim.[6] In the admiralty context, this Court has ruled that the Eleventh Amendment is not implicated where a state makes a claim to a res not in the state's actual possession. *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 504-08 (1998).

Nor need this Court opine on situations where states merely answer (or answer and counter-claim) in a federal court proceeding, although lower courts are mixed on this point. Compare *Paul N. Howard Co. v. Puerto Rico Aqueduct Sewer Auth.*, 744 F.2d 880, 886 (1st Cir. 1984), cert. denied, 469 U.S.

[6] See *In re Lazar*, 237 F.3d 967, 976-78 (9th Cir. 2001); *In re Burke*, 146 F.3d 1313, 1318-20 (11th Cir. 1998), cert. denied, 527 U.S. 1043 (1999); *In re Platter*, 140 F.3d 676, 679-80 (7th Cir. 1998); *In re Creative Goldsmiths of Washington, D.C.*, 119 F.3d 1140, 1148-49 (4th Cir. 1997), cert. denied, 523 U.S. 1075 (1998); *In re 995 Fifth Ave. Assocs.*, 963 F.2d 503, 507 (2d Cir.), cert. denied, 506 U.S. 947 (1992); *WJM, Inc. v. Mass. Dep't of Public Welfare*, 840 F.2d 996, 1002-03 & n.8 (1st Cir. 1988).

1191 (1985) (finding waiver), with *Santee Sioux Tribe of Nebraska v. Nebraska*, 121 F.3d 427, 431 (8th Cir. 1997) (no waiver) and *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385 n.4 (10th Cir. 1997) (same). A state's mere appearance and answer in a federal proceeding, even if accompanied by counter-claims or set-offs and defenses on the merits, may not rise to the same level of litigation conduct as in the removal context.

Removal constitutes such a clear and affirmative invocation of federal court jurisdiction as to justify a bright-line rule that states, in these circumstances, waive their Eleventh Amendment immunity. Such a rule would have the virtue of clarity and precision, making it possible for states, and their counsel, to effectively plan the litigation strategies they wish to pursue.

D. *Ford Motor*'s Authorization Requirement is Inapplicable in Removal Cases

1. Petitioner acknowledges that the crux of the Eleventh Circuit's ruling below was that under the rule of *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945), a state's waiver of Eleventh Amendment immunity can only be as valid as the authority of the official making it. The Eleventh Circuit concluded that under Georgia's constitution and statutes, the Attorney General of Georgia lacked the requisite authority to waive the state's Eleventh Amendment immunity by petitioning for the removal of a case from state court to federal court. Pet. App. 5a-6a.

Under *Ford Motor*, the test to determine whether a state official is authorized to waive the state's Eleventh Amendment

immunity was interpreted by the Eleventh Circuit to be quite "stringent." Pet. App. 4a. A waiver of Eleventh Amendment immunity by state officials must be explicitly authorized by the state "in its Constitution, statutes and decisions." *Ford Motor*, 323 U.S. at 467. In addition, *Ford Motor* observed that such authority "is not to be presumed in the absence of clear language to the contrary." Id. at 468. The last element in the holding of *Ford Motor* was that the relevant determinations concerning a state officer's authority to waive Eleventh Amendment immunity (at least where the state was an involuntary defendant in federal court) would be made under state, and not federal, law. See id. at 467. If state law is unclear on the authority issue, a federal court may have "resort to the general policy of the state as expressed in its Constitution, statutes and decisions." Id. The *Ford Motor* Court also indicated that "[a]dministrative construction by a state of its statutes of consent has influence in determining our conclusions." Id. at 470 (citing *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 57 (1944)).

Were the rule of *Ford Motor* to be literally and slavishly applied in this case, Petitioner would be obliged to candidly concede that Georgia law appears not to expressly authorize Georgia's Attorney General to waive the state's Eleventh Amendment immunity. But Petitioner submits that *Ford Motor* can be critically distinguished on a number of grounds, not the least of which is that the decision does not deal with situations where the state actually invokes the jurisdiction of the federal courts. *Ford Motor* may be also an unreliable guidepost in the domain of this Court's new Eleventh Amendment jurisprudence. Lastly, the rule of *Ford Motor* — if it is to be applied at all — must necessarily be tempered by such federal law considerations of judicial estoppel and other equitable concerns where a state purports to assert federal jurisdiction and then later recants that choice.

2. Even a cursory review of the procedural posture of *Ford Motor* would reveal that the decision did not implicate a state removing a case to federal court. In fact, the factual scenario presented in *Ford Motor* was a suit brought by a private plaintiff in federal court, with the state merely appearing to defend. See 323 U.S. at 466-67 ("[Indiana's Attorney General] appeared in the federal District Court and the Circuit Court of Appeals and defended the suit on the merits.").

Indeed, in the original contemplation of the Court's decision, the key factor was that the suit in federal court involved the taxing authority of the state. In that connection, the *Ford Motor* Court observed:

> the construction [the Court has] given the Indiana statute leaves open the road to review in this Court on constitutional grounds after the issues have been passed upon by state courts. The advantage of having state courts pass initially upon questions which involve the state's liability for tax refunds is illustrated by the instant case where petitioner sued in a federal court for a refund only to urge on certiorari that the federal court erred in its interpretation of the state law applicable to the questions raised.

Id. at 470. That *Ford Motor* may have been intended to be confined to its unique context of insulating state taxing authority from federal intervention was actually confirmed by this Court in subsequent decisions. See *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577 (1946) ("These cases [*Ford* and *Read*] declare the rule that clear declaration of a State's consent to suit against itself in the federal court on fiscal claims is required. The reason underlying the rule . . . is the right of a State to reserve for its courts the primary consideration and decision of its own tax litigation because of the direct impact of

such litigation upon its finances.").

A handful of subsequent decisions of this Court discuss *Ford Motor*'s authorization requirement, but none applies it to situations where a state affirmatively invoked federal court jurisdiction, and none purports to extend the requirement where a state removes a case to federal court. See, e.g., *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam). At most, the rule of *Ford Motor* may have been intended only to prevent unintentional waivers of Eleventh Amendment immunity when a state's lawyers merely appear in federal court to defend a suit.

Where a state acts to invoke federal court jurisdiction, the inquiry under *Ford Motor* may more properly be regarded as whether state law authorizes the state officer to proceed in federal court. In *Schacht*, Justice Kennedy noted in his concurrence that if the issue of the authority of a state official's removal of a case to federal court were to arise, he would not find the holding of *Ford Motor* to be an "insuperable obstacle to adopting a rule of waiver in every case where the State, through its attorneys, consents to removal from the state court to the federal court." 524 U.S. at 397. Justice Kennedy also observed that "a different case may be presented when a State under no compulsion to appear in federal court voluntarily invokes its jurisdiction." Id. at 395. This inquiry of focusing on the authority of the state official to invoke federal jurisdiction is not as stringent as requiring that state law expressly permit the state Attorney General to waive Eleventh Amendment immunity. This approach has been followed in some lower courts. See *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1148 (4th Cir. 1997); *In re Fraser*, 75 F. Supp. 2d. 572, 584 (E.D. Tex. 1999).

For our present purposes, Georgia law manifestly authorizes the state's attorneys to invoke federal jurisdiction.

The Georgia Constitution and statutes expressly authorize Georgia's Attorney General to represent the state in federal court. See GA. CONST. Art. 5, § 3, ¶ 4 ("The Attorney General . . . shall represent the state . . . in *all* civil and criminal cases in *any* court . . . "); O.C.G.A. § 45-15-3(6) ("It is the duty of the Attorney General . . . [t]o represent the state in *all* civil actions tried in *any* court . . . .") (emphasis added).

To the extent that authority is a relevant inquiry at all in waiver by litigation conduct cases, emphasizing the power of state officials to invoke federal jurisdiction would appear to be the best way to avoid the moral hazard of having state Attorneys General sign removal petitions (under pain of Rule 11 sanctions) and then later disclaim their capacity. This Court has been properly chary of state claims in this regard. In *Gunter v. Atlantic Coast L. R. Co.*, 200 U.S. 273 (1906), the Court turned aside South Carolina's assertion that its officers were disabled from participating in earlier federal litigation. The Court concluded that a South Carolina statute authorized such action. See 200 U.S. at 285-86.

Even more pertinently, this Court in *Gardner v. New Jersey*, 329 U.S. 565 (1947), held that New Jersey's State Comptroller was authorized to file a proof of claim, and the state's Attorney General was empowered to "resist[] the objections made to the claim, and is authorized to 'Attend generally to all matters in which the state is a party or in which its rights and interests are involved'." Id. at 574-75 (quoting N.J.R.S. § 52:17-2g (1937)). Needless to say, the New Jersey statute relied upon by the Court in *Gardner* to confirm the Attorney General's authority is nearly identical in substance to Georgia's statute at issue here. See O.C.G.A. § 45-15-3(6) ("It is the duty of the Attorney General . . . [t]o represent the state in all civil actions tried in any court . . . .")

3. There may be even greater cause for concern in extending *Ford Motor*'s authorization requirement to the removal context. The decision may properly be regarded as an artifact of a bygone period in this Court's Eleventh Amendment jurisprudence. With the demise of virtually all forms of constructive waivers in *College Savings Bank*, 527 U.S. at 680, and particularly of *Parden* waiver, the need for ascertaining the authority of state officials to engage in market participation, or the acceptance of federal conditionalities, or other tenuous activities tending towards a finding of waiver, is less significant. It is certainly less relevant in the context of waivers via affirmative litigation conduct in particular cases. To the extent that *Parden* appeared to rely on *Ford Motor*'s authorization requirement, see 377 U.S. at 194-95, it is highly suggestive that *Ford Motor*'s rule was intended to be applied in situations only of constructive waiver, and not where a state affirmatively invokes federal court jurisdiction.

In a similar fashion, *Ford Motor*'s emphasis on the application of state law (the authority of state officials) to what would otherwise be a matter of federal concern (the invocation of immunity in federal court), may be explained by the peculiar posture of that case. Because Indiana was an involuntary defendant in the federal proceeding, the essential ingredient of consent was absent, irrespective of the authority of Indiana's Attorney General under state law. The reference to state law authority was thus not essential to the result in *Ford Motor*. This observation suggests that there may be an appropriate, and limited, role for federal law in conditioning and modifying the formalities of state law rules regarding official authority. See *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n.5 (1997) ("Ultimately, of course, the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore 'one of the

United States' within the meaning of the Eleventh Amendment, is a question of federal law. But that federal question can be answered only after considering the provisions of state law that define the agency's character."). This is particularly so where the state's attorneys engage in certain forms of litigation conduct with Eleventh Amendment-waiving consequences.

For example, *Ford Motor* does not preclude the application of judicial estoppel principles, see *New Hampshire v. Maine*, 121 S.Ct. 1808, 1814-18 (2001), where a state seeks federal court jurisdiction (through removal) only to disavow the legal consequences of that choice when it decides that it is not pleased with the outcome. And while Petitioner is mindful that "'ordinarily the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is not applied to states'," id. at 1817 (quoting *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 369 (1946)), the rule is relaxed where a state is in the position of an ordinary litigant. See 329 U.S. at 369 ("in the present litigation Illinois is in the position of any lien creditor."). Where a state, through a removal petition, compels a party to proceed with litigation in federal court, and then later seeks to unwork that invocation, it might be said that the state has placed itself on an equal footing with private litigants. See also *Murray v. Silberstein*, 882 F.2d 61, 66-67 (3d Cir. 1989) (principles of judicial estoppel prevent a plaintiff in suit against a state to alternatively raise and disclaim the significance of the Eleventh Amendment bar).

4. That leaves the fairness of permitting states to remove cases to federal court, to demand dispositive rulings, and to *then* seek dismissals based on Eleventh Amendment immunity by virtue of the purported lack of authority of the state official making the initial removal. See *Newfield House, Inc. v. Mass. Dep't of Public Welfare*, 651 F.2d 32, 36 n.3 (1st Cir.) ("[Massachusetts'] attempt now to invoke the Eleventh

Amendment would if allowed work a virtual fraud on the federal court and opposing litigants."), cert. denied, 454 U.S. 1114 (1981); *Sutton v. Utah State Sch. for the Death & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) ("The Attorney General's Office having caused the removal to federal court here, and having litigated throughout on the merits here, we feel it would be . . . grossly inequitable to allow assertion of the Eleventh Amendment bar. . . ."). These sentiments were certainly mooted in Justice Kennedy's concurrence in *Schacht*, where he observed that

> [i]n permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal.

524 U.S. at 394 (Kennedy, J., concurring).

The true mischief presented by Georgia's litigation strategy in this case was the direct denial of Lapides' right to proceed (under both state law and federal grounds) against the state in its own courts. Under the Georgia Tort Claims Act, the state has permitted plaintiffs a state-court forum for the assertion of certain tort claims directly against the state. At least as to those tort claims, allowing the state to remove and employ the Eleventh Amendment to defeat the claims would be the same sort of "bait and switch" tactic that this Court condemned in *Reich v. Collins*, 513 U.S. 106, 111 (1994) ("But what a State may not do, and what Georgia did here, is to reconfigure its [state law remedial] scheme, unfairly, in midcourse – to 'bait and switch,' as some have described it."); see also *Alden v. Maine*, 527 U.S. 706, 740 (1999). The remove-and-claim-

immunity gambit also deprives plaintiffs of the state court forum that state law provides for section 1983 and due process claims, since state rules of civil procedure and preclusion would normally require such claims to be asserted in the same action as tort claims. Georgia's litigation strategy thus purports to block any avenue of relief open to plaintiffs.

This case thus presents the Court with the opportunity to eliminate one, albeit limited and potential, abuse by states in the exercise of their Eleventh Amendment immunity. Ever mindful of the strong federalism concerns that undergird the state's forum immunity in federal courts, this Court should nonetheless decline to extend Eleventh Amendment doctrine in such a way as to sanction such strategic behavior on the part of states. Given the extensive procedural safeguards attendant with a state's removal of a case to federal court, it is manifest that states voluntarily and knowingly invoke federal court jurisdiction. The precise authorization of the state's attorneys to forfeit Eleventh Amendment immunity should be irrelevant where it is clear that such counsel have the power to invoke federal jurisdiction.[7] And since the state is not foregoing any

[7] In the event this Court should decide that a state Attorney General's authority to waive Eleventh Amendment immunity remains decisive, Petitioner would submit that the proper course would be to require that where states have failed to grant that authorization they may not seek to invoke the federal court's jurisdiction. In other words, states may not, by reserving the Eleventh Amendment bar, only conditionally and partially accept federal court jurisdiction, whether by removal or other means. For those states such as Georgia – which has apparently refused to allow its attorneys the power to waive Eleventh Amendment immunity, see Pet. App. 5a-6a (discussing GA. CONST. Art. 1, § 2, ¶ 9 (e) - (f), and state court cases) – attempts to invoke federal court jurisdiction should be regarded as a nullity. If a state's attorneys thus seek to remove a case and fail to provide the federal court with definitive proof of their capacity to waive the Eleventh

(continued...)

other immunities or defenses it otherwise legitimately possesses, no genuine dignity interest of the states is sacrificed.

But what is most certainly vindicated by the rule propounded here — that a state's removal of a case to federal court forfeits its Eleventh Amendment immunity — is that states will be expected to abide by the decisions of the tribunals they have selected. In such circumstances, as Justice Kennedy noted in *Schacht*, "[t]his is the situation in which law usually says a party must accept the consequences of its own acts." Id. at 393.

[7](...continued)
Amendment bar, the proper course for the district court would be to remand the entire case back to state court.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eleventh Circuit should be reversed and the case should be remanded for further proceedings.

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Supreme Court of the United States

PAUL LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

WHETHER THE STATE'S ACTION IN JOINING IN THE REMOVAL OF A CASE TO FEDERAL COURT WHILE SIMULTANEOUSLY ASSERTING ITS ELEVENTH AMENDMENT IMMUNITY CONSTITUTES A KNOWING AND UNEQUIVOCAL WAIVER OF ITS IMMUNITY.

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STATEMENT

Paul Lapides, a professor at Kennesaw State University, filed the instant action in the Superior Court of Cobb County, Georgia. Lapides sought damages against the Board of Regents of the University System of Georgia, and three faculty members at Kennesaw State University (in their official and individual capacities), Edwin Rugg, Timothy Mescon and Teresa Covin (collectively, the Defendants). (J.A. 11). Shortly after filing the original complaint Lapides dismissed Mescon as a defendant and pursued his claims against the other defendants. (R. 1). Lapides claimed that Covin and Rugg caused defamatory material related to allegations of sexual harassment to be placed in his personnel file and disseminated to others. (J.A. 12-13).

Lapides maintained in his complaint that these actions resulted in "numerous violations of his due process rights" and violated his "constitutionally protected right to practice his profession." (J.A. 12). Lapides also claimed that he was subjected to a hostile work environment, intentional infliction of emotional distress and an invasion of privacy. (J.A. 15-16). All claims were generally asserted against all defendants. (J.A. 9-19). In addition, Lapides asserted his intent to amend his complaint to add claims of discrimination. (J.A. 17-18). Lapides sought in excess of $1,000,000.00 in compensatory damages, unspecified punitive damages, costs, and attorneys' fees but did not seek an injunction or declaratory judgment. (J.A. 17-18).

The Board of Regents and the employees answered in the Superior Court. The Board of Regents denied the bulk

of Lapides' factual contentions and raised the Eleventh Amendment to the United States Constitution, sovereign immunity, and failure to state a claim as defenses. (J.A. 20-34). Rugg, Mescon, and Covin filed a joint answer and raised the Eleventh Amendment, sovereign immunity, failure to state a claim, and qualified immunity as defenses. (J.A. 35-47). On the same day, the Defendants jointly removed the case to federal court. Although Lapides' complaint was ambiguous as to whether he stated a federal claim, the Defendants believed that the complaint could be construed as sufficient notice of a federal claim to trigger the thirty-day deadline for removal. 28 U.S.C. § 1446(b). Therefore, the Defendants assumed Lapides brought his constitutional claims under 42 U.S.C. § 1983 and asserted the statute and the anticipated discrimination claim as a basis for federal court jurisdiction. (J.A. 4). Lapides has never disputed that his constitutional claims are brought pursuant to 42 U.S.C. § 1983.

In federal court, the Board of Regents and the individuals filed a motion to dismiss all claims, or in the alternative, dismiss the federal claims and remand the state claims barred by the Eleventh Amendment. (J.A. 48; App. 14a-16a). In particular, Defendants asserted that: (1) the federal claims against the individuals in their individual capacities are barred by the doctrine of qualified immunity; (2) the federal claims against the Board of Regents and the named employees in their official capacities are barred by the Eleventh Amendment; (3) neither of these parties are considered "persons" under § 1983; and (4) the state law claims are barred by the Eleventh Amendment. (App. 10a-17a).

Lapides argued in response that the Board of Regents and the individuals in their official capacity (hereinafter the State) waived their Eleventh Amendment immunity.[1] (R. 6). Lapides also filed a motion to remand the entire case asserting that the State waived its right to remove the case by answering in state court and asserting its Eleventh Amendment immunity. (J.A. 51). The State responded and reasserted its position that the barred state law claims could be remanded back to state court but that the court should dismiss the federal claims on the three grounds previously asserted. (App. 9a).

In its ruling, the district court first determined that the individuals were entitled to qualified immunity on the § 1983 claims. (Pet. App. 25a). The district court's finding on the issue of qualified immunity was never appealed and is now final. (R. 45, 46). Next, the district court accepted Lapides' position and found that the State waived its Eleventh Amendment immunity. (Pet. App. 27a). The court concluded that the Board of Regents and the individual employees in their official capacities are liable to the extent Lapides can show "an unconstitutional policy or custom by the Board of Regents through Kennesaw State University." (*Id.*). Accordingly, the court denied the motion to dismiss the § 1983 claims against the Board of Regents and the individuals in their official capacity. (*Id.* at 28a).

---

[1] As discussed at Part A.4, *infra*, Lapides' current position is that the State only waives part of its immunity. Lapides argues that the State waives its "forum immunity" not to have the federal courts adjudicate claims against the State under state law. He concedes that the State did not waive its sovereign immunity to the constitutional claims. (Pet. Br. p. 31).

The State appealed the decision of the district court to the Eleventh Circuit Court of Appeals. (R. 23). At the Eleventh Circuit, Lapides once again asserted that the State waived its Eleventh Amendment immunity including the State's sovereign immunity. (Appellee Br. pp. 4-17). Lapides argued that "[t]he Actions of the State of Georgia in this case are unequivocal evidence of its intent to waive sovereign immunity and not to preserve it." (Appellee Br. p. 17). The Eleventh Circuit rejected Lapides' argument on three grounds.

First, the court found that the Georgia Attorney General did not have authority to waive the State's Eleventh Amendment immunity under *Ford Motor Co. v. Dept. of Treas. Of Indiana*, 323 U.S. 459 (1945). (Pet. App. 4a-8a). Second, the court relied on the statement in *Wisconsin v. Schacht*, 524 U.S. 381, 386 (1998), that the presence of claims barred by the Eleventh Amendment "does not destroy removal jurisdiction that would otherwise exist." (Pet. App. 10a). Finally, the court noted that the "present case did not find its way into our courts because of a state initiated action." (*Id.*). To the contrary, "Lapides filed suit and the state removed to theoretically take advantage of our superior knowledge of the federal question involved in the case." (*Id.* at 10a-11a).

The court therefore instructed the district court to hear the non-barred claims over which it has jurisdiction and to remand all barred claims to the state superior court for adjudication. (Pet. App. 11a). Lapides' petition for a writ of certiorari to this Court followed.

SUMMARY OF THE ARGUMENT

A. The State of Georgia joined in the removal of this action for the benefit of its employees so that the employees could take advantage of the expertise and precedent of the federal court and could have the right to direct appeal on the issue of qualified immunity. State employees should not be deprived of these benefits because their co-defendant (the State) cannot consent to removal without waiving its Constitutional right. Limiting the State's waiver to what Lapides and the United States call "forum immunity" – the immunity that a state retains when it waives its immunity only in its own courts – does not make this intrusion on the State's fundamental right any more defensible.

The State's act in removing this case does not amount to a waiver of its Eleventh Amendment immunity. A state's Eleventh Amendment immunity may not be waived except when stated in the most unequivocal and express terms by a state officer who has the authority to waive the state's immunity. Georgia's act in participating in the removal of this case does not amount to an unequivocal and express waiver of its immunity, and the Attorney General for the State of Georgia does not have the authority to waive Georgia's Eleventh Amendment immunity. In the case at bar, the State raised its Eleventh Amendment immunity in its answer and in its motion to dismiss, both filed the same day as the notice of removal. Georgia never expressed an intent to waive its immunity.

This is not a case where the State has voluntarily become a party to an action or has initiated an action. Lapides filed an action against the State and the act of

removal does not convert the State from a defendant to a plaintiff. Lapides commenced and continues to prosecute this action. Thus, the action against the State falls squarely within the protection of the Eleventh Amendment.

The costs of a "waiver-by-removal" rule far outweigh the one benefit. If the Court adopts this new rule, Georgia would instantaneously be at odds with its employees who understandably have a desire to take advantage of the federal court's expertise, precedent and procedure on issues such as qualified immunity. Such a rule would conflict with Georgia's right and intent to have state law questions decided only in the State's courts. The State would also be subject to game-playing and manipulation of claims and cases by plaintiffs seeking to block removal. The only benefit to be gained by adopting this new rule is that all claims might be heard in one forum. The cost for this convenience is too high.

B. Lastly, the Attorney General for the State of Georgia does not have authority to waive Georgia's immunity. The Georgia Constitution specifically reserves the State's Eleventh Amendment immunity. GA. CONST. Art. 1, §§ II, ¶ IV(e)(f). Nothing in the Georgia Constitution, statutes, or case law provide that the Attorney General for the State of Georgia has the authority to waive the State's Eleventh Amendment immunity. More specifically, he lacks the authority to waive either the State's entire sovereign immunity or the so-called "forum immunity" as described by Lapides and the United States. This Court has repeatedly rejected the theory that a sovereign's immunity can be waived through an executive officer's

litigation conduct where, as here, the sovereign's executive officer does not have specific authority to effectuate such a waiver.

In summary, the decision of the Eleventh Circuit should be affirmed because Georgia did not expressly and unequivocally waive its Eleventh Amendment immunity; Georgia did not affirmatively assert a claim; and the Attorney General for the State of Georgia does not have the authority to waive Georgia's Eleventh Amendment immunity.

ARGUMENT

THE STATE OF GEORGIA DID NOT WAIVE ITS ELEVENTH AMENDMENT IMMUNITY WHEN ITS COUNSEL AGREED TO REMOVE THIS ACTION TO FEDERAL COURT

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or any citizens or subjects of any foreign state.

U.S. CONST. Amend XI.

The bounds of the states' sovereign immunity are not limited, however, by the words of the Eleventh Amendment. *See Alden v. Maine*, 527 U.S. 706 (1999); *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Hans v. Louisiana*, 134 U.S. 1 (1890). To the contrary, for over a century this Court has "grounded

[its] decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996). As a result, although the states' immunity from suit has sometimes been referred to as Eleventh Amendment immunity, the *Alden* Court explained,

> [t]he phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.

Alden, 527 U.S. at 713.

"A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (emphasis in original). This immunity "largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals." *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994).

A state may, of course, waive its sovereign immunity. The Court will not find such a waiver, however, unless it

is "unequivocal" and "stated by the most express language" so as to "leave no room for any other reasonable construction," *Edelman v. Jordan*, 415 U.S. 551, 673 (1974); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and where the officer executing the waiver has express authority under the laws of the State to waive the State's immunity. *Ford Motor Co. v. Department of Treas. of State of Indiana*, 323 U.S. 459 (1945). Both of these requirements fully apply to the waiver of the so-called "forum immunity" as described by Lapides and the United States – neither of these two requirements is met in the case at bar.

A. Removal of This Case Did Not Clearly and Unequivocally Express Georgia's Intent to Permit a Federal Court to Resolve the Claims Barred by the Eleventh Amendment.

1. The State of Georgia agreed to removal of this action for the benefit of the individual defendants.

At the heart of Lapides' argument are his dual contentions that (1) removal by a State is a "clear and manifest . . . expression of the State's willingness to submit itself to the judgment of the federal courts" (Pet. Br. p. 10), and (2) the State's action here represents an "abuse . . . in the exercise of [its] Eleventh Amendment immunity." (Pet. Br. p. 42). It is therefore important at the outset to explain why Georgia in this case (like Wisconsin in *Schacht*) found it necessary to remove a case to federal court and then assert its Eleventh Amendment immunity.

Lapides filed his case in the state court raising both federal and state claims against the State and individuals. The individual state employees wished to take advantage of the federal court's expertise and precedent on the issue of qualified immunity. Additionally, since Georgia does not provide a direct appeal in the event they were denied qualified immunity, they wished to take advantage of the right to an interlocutory appeal. O.C.G.A. § 5-6-34; 5-6-35; *Johnson & Johnson v. Kaufman*, 226 Ga. App. 77, 80-82 (1997); cf. *Johnson v. Fankell*, 520 U.S. 911 (1997). Since the removal statute requires that all parties consent to the removal of an action, see, e.g., *Chicago, R.I. & P.R. Co. v. Martin*, 178 U.S. 245, 248 (1900), the State's employees would have been harmed had the State not agreed to remove the action.

The State's agreeing to remove this action, therefore, in no way suggests that the State intended to permit the federal court to resolve claims that would be barred by the Eleventh Amendment. Rather, by removing the case, the State (and the individual defendants) sought merely to accomplish the ordinary objective of removal – placing the case in front of the federal district court as though it had initially been filed there. And had the action initially been filed in federal court, the individual defendants would have benefited from the federal court's experience with qualified immunity issues and the right to an interlocutory appeal on that issue, while the State would have been able to assert its Eleventh Amendment immunity.

2. Georgia's action in removing this case did not constitute a clear and unequivocal waiver of its Eleventh Amendment immunity.

Georgia consented to have the federal court adjudicate the claims over which that court had subject matter jurisdiction, but Georgia specifically reserved all of its defenses in the removal and asserted its Eleventh Amendment immunity in its answer and its motion to dismiss filed at the same time as the removal. Such action does not amount to an intentional relinquishment of the State's Eleventh Amendment immunity.

This Court has consistently found that "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights. . . ." *Edelman v. Jordan*, 415 U.S. at 673. The Court "do[es] not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 307 (1937). Thus, when Congress intends to abrogate the States' immunity it may do so only "by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Where a state intends to waive its immunity, the Court insists "that the State's consent be unequivocally expressed." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). The Court's "reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system." *Id.*

The Court soundly rejected the doctrine of implied waiver in *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999):

> The classic description of an effective waiver of a constitutional right is the intentional relinquishment or abandonment of a known right or privilege. Courts indulge in every reasonable presumption against waiver of fundamental constitutional rights. State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected. And in the context of federal sovereign immunity – obviously the closest analogy to the present case – it is well established that waivers are not implied. We see no reason why the rule should be different with respect to state sovereign immunity.

Id. at 682 (citations and internal quotation marks omitted).

Lapides and the United States refer to the act of removal as affirmative consent. However, they are improperly equating "agreement to remove" with "agreement to waive." An agreement to remove is simply an agreement to remove, no more and no less. A new "waiver-by-removal" rule is truly just another form of the constructive consent doctrine that was already rejected in *College Savings Bank*. Thus, since the State's action in removing this case does not express a clear and unequivocal intent to waive its immunity, no waiver can be found.

3. The Court has never found that a state waived its Eleventh Amendment immunity merely through a state's litigation conduct where the state did not affirmatively assert a claim.

Lapides maintains that a knowing and unequivocal consent may be unnecessary because the cases requiring such clear consent involve broad statutory waivers of immunity. (Pet. Br. p. 12). He asserts that *Clark v. Barnard*, 108 U.S. 436 (1883); *Gunter v. Atlantic Coast R. Co.*, 200 U.S. 273 (1906); and *Gardner v. New Jersey*, 329 U.S. 565 (1947) are more applicable because they involve particularized litigation conduct in specific cases. (Pet. Br. pp. 13, 16-26). To the contrary, none of the cases relied upon by Lapides and the United States involved a State's defensive litigation conduct.

More specifically, the cases relied upon by Lapides and the United States do not support their position because: (1) none of the actions involved a claim for damages against the State; (2) *Clark* and *Gardner* involved a State's entry into a case in an effort to recover a *res* from the court; (3) *Gunter* involved the court's enforcement of a restraining order which the State attempted to violate after 25 years of acquiescence; and (4) none of the more recent citations to these three cases expands the waiver doctrine to include a waiver in the context of the present case. Thus, it is apparent that the stringent consent standard discussed in Part A(2), *supra*, is more applicable to the case at bar. The three cases principally relied upon by Lapides will be addressed in turn.

In *Clark v. Barnard*, 108 U.S. 436 (1883), the State of Rhode Island intervened in an action in federal court in order to make a claim against a fund in the registry of the court. It was the "voluntary appearance of the state in intervening as a claimant of the fund" that formed the basis for the Court's finding of its limited jurisdiction over the State. *Id.* at 447. The *Clark* Court noted that the State had "made itself a party to the litigation," and stated that, based upon the State's entry into the case to make a claim on the fund held by the court, it had the authority to decide the "adverse rights" of the State "to the fund" it claimed. *Id.* at 448.

The Court's discussion of waiver of the Eleventh Amendment applied to the defense raised by Clark, the State treasurer, against being made a defendant prior to the State's intervention in the case. Lapides muddles the holding of the Court by failing to recognize that it was this subsequent intervention by the State that made it unnecessary for the Court to consider Clark's immunity defense. Further, even with the State's voluntary intervention, the Court never implied that it had authority to delve into the State's treasury in order to compensate others for alleged damages. The *Clark* holding is limited to the distribution of the funds deposited with the court.

Likewise, in *Gardner v. New Jersey*, 329 U.S. 565 (1947), the State initiated actions in state court to collect back taxes owed by a railroad. When the debtor railroad filed for bankruptcy, the State asserted a claim for the taxes that the state courts already ordered the debtor to pay. The railroad filed objections to State's proof of claim, and the bankruptcy court found that it had authority to determine the validity of the claims in the course of resolving

the objections. The State protested that this finding was a violation of its Eleventh Amendment rights.

The *Gardner* Court found "that the reorganization court had jurisdiction over the proof and allowance of the tax claims and that the exercise of that power was **not** a suit against the state." *Id.* at 572 (emphasis added). The Court concluded that "the procedure of proof and allowance is not transmuted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought from the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*." *Id.* at 574.

In both *Clark* and *Gardner*, the State voluntarily entered the action seeking something from the debtor. Technically, the Eleventh Amendment was not even implicated since the actions were not "commenced or prosecuted **against**" the States. U.S. CONST. Amend. XI (emphasis added). In contrast, Lapides commenced an action against the State of Georgia, albeit in the state court, and he has continued to prosecute the action in federal court. The fact that the State removed the action to federal court does not transform the State from a defendant to a plaintiff. *Clark* and *Gardner* are therefore inapposite.

Even Lapides admits that "[w]hile a state's filing of proofs of claim in bankruptcy (see 11 U.S.C § 106 (b)) or in admiralty (see FRCP Supp. Rules B & C), raise similar issues of invoking federal court jurisdiction, the additional feature of a state asserting priority to a *res*, may

distinguish such cases." (Pet. Br. p. 33).[2] Although Lapides makes this concession, he attempts to bolster his position by stating that *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) broadens the rule of *Clark* beyond the bankruptcy application. (Pet. Br. p. 21). *Petty*, however, is no help to Lapides. Although the case involved a wrongful death claim for damages against the State, the plaintiff's ability to sue the State was derived from an express provision of an interstate compact providing that the State could sue and be sued for any matter arising under the compact. *Id.* at 280-282. A state legislature's decision to enter an interstate compact is plainly different from the removal of a particular action to federal court.

Finally, in *Gunter v. Atlantic Coast R. Co.*, 200 U.S. 273 (1906), the South Carolina legislature exempted a railroad from tax. When the State later changed the law to provide for taxation, the railroad filed an action in federal court seeking to enjoin the State from collecting taxes. *Id.* The Court ruled that the railroad could not be taxed and enjoined the collection of taxes. *Id.*; *Humphrey v. Peagues*, 83 U.S. (16 Wall.) 244 (1872). The State acquiesced and did not attempt to collect taxes again until approximately 25

[2] Respondents are not unfamiliar with the lower courts' expansion of *Gardner* in the bankruptcy context. *See In Re 995 Fifth Ave. Assoc.*, 963 F.2d 503 (2d Cir. 1992); *In Re Burke*, 146 F.3d 1313 (11th Cir. 1998); *In Re Lazar*, 237 F.3d 967 (9th Cir. 2001). We are, however, in agreement with Lapides that these issues need not be addressed at this time. (Pet. Br. p. 33). Should the Court choose to address those cases, however, it is clear that they cannot bear the broad weight placed upon them by the lower courts.

years later when the legislature passed an Act requiring the Attorney General to recover the back taxes. *Id.* at 279. Pursuant to this legislative mandate, the Attorney General attempted to collect the back taxes and interest by filing actions in the State's courts. The railroad sought and received injunctive relief pursuant to the prior court order. The Court found that the Eleventh Amendment did not restrict its authority to enforce its prior judgment. *Id.* at 292. Once again, this situation has no application to the case at bar. First, *Gunter* involved the State's compliance with court-ordered injunctive relief, not an action for damages against the State. *Gunter* may thus be limited by the Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908) two years later finding that the Eleventh Amendment does not apply in actions for prospective injunctive relief against state officials.

Additionally, the *Gunter* Court's reference to the State's waiver of its immunity was primarily based on state legislative enactments and contemporaneous administrative interpretations of the attorney general's authority, as well as the State's long acquiescence to court-ordered injunctive relief without the State's questioning the Court's jurisdiction. *Id.*; *Ford Motor Co. v. Department of Treas. of State of Indiana*, 323 U.S. 459, 469 (1945). Neither of these factors exist here. The *Gunter* Court opinion does not hold or even imply that, where a state objects to its jurisdiction at the outset of the litigation, and when the attorney general is not authorized to waive the state's

immunity, it nonetheless waives its immunity from suit by its litigation conduct.[3]

Lapides also cites *Missouri v. Fiske*, 209 U.S. 18 (1933), to support his reading of *Gunter*. *Fiske*, however, supports the State's position more than it does Lapides'. In *Fiske*, the State intervened in an action and attempted to restrict the federal court's adjudication of a claim to an estate. The Court found that the actions of the State did not amount to sufficient conduct to cause a waiver of its immunity because the State entered into the proceeding to seek a limited ruling from the court. When Georgia entered the federal forum in this case, it asserted Eleventh Amendment immunity as to all claims and also sought dismissal on alternative grounds. If a state's voluntary entrance into an action as a party to receive a limited ruling does not amount to a waiver, a state's removal to a forum after it has already been sued so as to seek a limited ruling while asserting its Eleventh Amendment immunity, certainly should not amount to waiver.

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[3] It is difficult to gauge the efficacy of *Gunter* in light of the Court's subsequent decisions that allow the Eleventh Amendment to be raised for the first time on appeal. *See Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459 (1945); *Edelman v. Jordan*, 415 U.S. 651 (1974). The Court has even allowed the United States to assert its corollary immunity in a collateral attack on a court judgment entered without jurisdiction. *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). Moreover, the decision in *Gunter* may be more a product of the struggle the Court was having in reconciling the Eleventh Amendment with the Supremacy Clause as described in this Court's opinion in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984).

Similarly, this Court has repeatedly found that where a sovereign seeks relief in the federal courts it does not waive its immunity from cross-claims and counterclaims. *United States v. Shaw*, 309 U.S. 495 (1940) (where government files a claim against an estate it does not subject itself to an affirmative cross-claim for damages); *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 513-514 (1940) (where sovereign filed a complaint, a mandatory counterclaim may be litigated only as to the recoupment of the government's claim); *see also Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). While these cases involve the federal government and Indian tribes, not states, they are persuasive authority as to the narrow limits of "waiver" through litigation conduct. *See California v. Deep Sea Research*, 523 U.S. 491, 506-507 (1998).

In summary, Lapides' argument that *Clark*, *Gunter*, and *Gardner* set the standard for waiver of the State's immunity through litigation conduct when the State is sued for money damages simply fails. The stringent standard established by more recent decisions of this Court should apply to the State's action in this case. The State did not choose to become a party to this action as it did in *Clark* and *Gardner*. Georgia did not acquiesce to a court order, nor is there legislative authorization as in *Gunter*. Lapides is pursuing damages against the State under state law – a situation that is not present in any of the cases he cites as support for his position.

4. Equity and practical considerations support the State's position.

A "waiver-by-removal" rule should not be embraced for many practical and equitable reasons. First, as noted in Section A(1), *supra*, such a rule would interfere with the longstanding right of defendants to have access to federal review of federal questions, thus putting the state at odds with its employees or other co-defendants. Second, such a rule would conflict with the state's right to have state law questions decided in the state's courts. Finally, it would lead to manipulation by plaintiffs by causing sham joinder of parties and claims. These costs far outweigh the sole benefit of having all claims heard in one forum and weigh heavily against a new waiver rule.

First, the adoption of a "waiver-by-removal" rule would place the states in an untenable position. States would be forced to choose between the right of their employees or other co-defendants to a more experienced forum with experience, precedent and the right to direct appeal on issues of qualified immunity, and the waiver of their immunity from federal courts interfering in the administration and enforcement of state law. Instantaneously, states would be in conflict with their employees or other co-defendants, who could benefit from the expertise of the federal court and from the right to direct appeal on the denial of qualified immunity.

When Congress created the removal procedure for federal question cases, Congress "expressed an unmistakable preference for a federal forum, at the behest of the defending party." *El Paso Natural Gas Company v. Neztsosie*, 526 U.S. 473 (1999).[4] This preference should not be hindered by attaching an unintended consequence to the use of the procedural right, especially where, as here, there is relatively little harm to the plaintiff. Ever since the creation of concurrent jurisdiction over federal question cases, Congress has provided for the removal of those causes from the state to the federal court. *See* 2 Stat. 88 (1801); 18 Stat. 470 (1875); 26 Stat. 826 (1891); 39 Stat. 726 (1916); 43 Stat. 936 (1925); 28 U.S.C. § 1441. This fact speaks volumes as to the need for defendants to have access to lower federal courts to interpret federal questions.[5] Furthermore, the need for defendants to remove has increased over the years due to the steady decrease in the Court's automatic review of federal question cases from the state courts. *See* 38 Stat. 790 (1914); 38 Stat. 803 (1915); 39 Stat. 726 (1916); 43 Stat. 936 (1925); 102 Stat. 662

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[4] In another context, the Court has found that a defendant's right to remove amounts to a Constitutional right. *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922).

[5] This Court noted in *Boys Markets Inc. v. Retail Clerk's Union*, 398 U.S. 235, 246, n.13 (1970), that, "[t]he legislative history of the federal question removal provision is meager, but it has been suggested that its purpose was the same as original federal question jurisdiction enacted at the same time in the Judiciary Act, of 1875, 18 Stat. 470, namely to protect federal rights, *see* H. Hart and H. Weshster, *The Federal Courts and the Federal System* 727-733 (1953), and to provide a forum that could more accurately interpret federal law, *see* Mishkin, *The Federal 'Question' in the District Courts*, 53 Col. L. Rev. 157, 159 (1953). . . . " The Court has also recognized the need for consistency in the interpretation of federal law when it stated, "it cannot be doubted that there is an important need for uniformity in federal law. . . . " *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

(1988). In an overwhelming majority of cases brought in state court, the only way that defendants will have an opportunity for federal review of federal constitutional questions is if they are able to remove a case to federal court. *See Boys Markets, Inc. v. Retail Clerk's Union*, 398 U.S. 235, 246, n.13 (1970). Never before has the exercise of this right come at such a high cost nor should it now.

Secondly, states have a vested interest in having their own courts decide issues of state law. The position advocated by Lapides and the United States would run afoul of this Court's admonition that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Moreover, such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Pennhurst*, 465 U.S. at 106. In this case, the result would be the federal district court construing the Georgia Tort Claims Act and potentially imposing sanctions against Georgia officials for violating Georgia tort law. This intrusion on state sovereignty is what Lapides argues should be exchanged for his convenience of litigating in a single forum. But the Court has already rejected the validity of exchanging "expediency and efficiency" for this intrusion into state sovereignty stating that to allow such an intrusion into state law "would emasculate the Eleventh Amendment." *Id.*

Finally, a "waiver-by-removal" rule would subject the State to manipulation by plaintiffs seeking to improperly block removal. Lapides decries "game-playing" by Georgia, although it is unclear what "game-playing"

would be avoided by the holding he urges.[6] What is clear, however, is that a ruling such as the one urged by Lapides is more likely to engender manipulation by the numerous plaintiffs seeking to raid the state treasury. Justice Kennedy cautioned that, "[I]f it were demonstrated that a federal rule finding waiver of the Eleventh Amendment when the State consents to removal would put States at some unfair tactical disadvantage, perhaps the waiver rule ought not to be embraced." *Wisconsin*, 524 U.S. at 397-398 (Kennedy, J. concurring). Such an "unfair tactical disadvantage" would result by the adoption of a "waiver-by-removal" rule.

In order to discourage removal, plaintiffs will be able to insert improper claims and parties along with their federal claims. This joinder device could easily be employed to force a state to litigate its federal claims in state court. The Court has long held that such sham joinder of parties in diversity cases would not defeat a defendant's right of removal. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921); *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 185-186 (1907). Yet, this is

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[6] Lapides suggests that allowing the State to remove a case only to allow it to dismiss all or some of the claims based upon the Eleventh Amendment is unfair. (Pet. Br. p. 40). First, it is important to note that Georgia in this case has always argued in the alternative that the barred state claims should be dismissed or remanded to the state court for adjudication. (App. 9a, 14a-16a). Secondly, the ruling of the Eleventh Circuit assured that there would be no inequity by ordering that all barred claims be remanded to the state court rather than dismissed outright. (App. to Pet. for Cert. 11a). Thus, Lapides is simply incorrect when he argues that the State's removal would "block any avenue of relief open to plaintiff." (Pet. Br. p. 42).

precisely what would occur should the Court find that a state waives its immunity by the removal of federal question cases.

Lapides claims that Georgia has gained an unfair advantage in its actions in this case. He cites to several cases that discuss potential manipulation by a state. (Pet. Br. pp. 40-41). These cases and criticisms are inapplicable to the case at bar. Based upon Lapides' apparent concessions regarding the State's retention of all but its "forum immunity," the only argument of possible harm or manipulation caused by removal is that a plaintiff might be forced to litigate his claims in two fora.[7]

A plaintiff has no right, however, to have all his claims heard in one forum. The Court and Congress have already provided that it is acceptable to bifurcate a plaintiff's claims. First, 28 U.S.C. § 1441(c) provides that when a federal question claim is removed along with an otherwise non-removable claim, "the district court may determine all issues therein or in its discretion, may remand all matters in which State law predominates." *See also* 28 U.S.C. § 1367(c) (authorizing federal courts to dismiss supplemental claims). While Congress did not provide a means for the state or anyone else to remove only those claims based on federal law, it did provide a vehicle for

[7] Lapides asserts that the state rules of civil procedure and preclusion require plaintiffs to assert their federal conditional claims in the same action as their tort claims. (Pet. Br. p. 42). A review of Georgia law shows that this will rarely be the case. O.C.G.A. § 9-12-40.

those claims based on state law to be returned to the state court.[8]

Moreover, in *Wisconsin v. Schacht*, 524 U.S. 381 (1998) the Court, "reject[ed] respondent's [Schacht's] argument" that the Court must be able to accept jurisdiction over the entire case in order for the removal to be valid. *Id.* at 391. In doing so, the Court also rejected the principle that there was some right of plaintiffs to have all their claims heard in one forum. *Id.*[9] *See also Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 122 (1984) ("applying the Eleventh Amendment to pendent claims [may] result [ ] in federal claims being brought in state court, or in bifurcation of claims.").

The Court has also recognized that bifurcation of claims is not an uncommon result in these types of cases thereby acknowledging that there is no right for plaintiffs to have all claims heard in one forum. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 121 (1985).

[8] Lapides appears to argue (Pet. Br. p. 32) that once a state removes a case to federal court, the court loses its authority to dismiss supplemental claims under § 1367(c). That contention is untenable, as even the United States recognizes. (U.S. Br. p. 24).

[9] Georgia is not unmindful of the fact the State in *Schacht* did not raise its Eleventh Amendment immunity until after the removal of the case. Lapides may argue that this distinction has some value. What is important to note, however, is that Lapides and his amici cite authorities that hold that the State should not be allowed to play games by raising the Eleventh Amendment at a late stage of the proceeding. (Pet. Br. pp. 41-42; Ceres Marine Brief pp. 18-22); *see also Wisconsin v. Schacht*, 524 U.S. at 397-398 (Kennedy, J., concurring). Such authorities do not support a state being penalized for asserting its immunity up front, thereby leaving no room to question its intent.

The removal statute, *Schacht* and *Pennhurst* allow for cases to be heard in two fora. Clearly, plaintiffs have no right to have their claims adjudicated in one forum. Litigating in one forum is nothing more than a convenience. Georgia should not be required to forfeit its Constitutional right so plaintiffs may more conveniently proceed once they have coerced its involvement in litigation.

In the end, plaintiffs who sue a State and States being sued are both faced with a forum choice and a consequence thereof. As masters of their own complaints, plaintiffs have the opportunity to block removal in any case by simply choosing not to pursue federal claims in state court. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

B. The Attorney General for the State of Georgia Does Not Have Authority to Waive the State's Eleventh Amendment Immunity.

In *Ford Motor Co. v. Department of Treas. of State of Indiana*, 323 U.S. 459 (1945), the Court found that prior to determining if a state waives its Eleventh Amendment immunity by its litigation conduct, it is first necessary to determine if "it is within the power of the administrative and executive officers of [the State] to waive the State's immunity." *Id.* at 467-68. More specifically, to determine if state officers are authorized to waive the state's immunity by their litigation conduct, "this court must resort to the general policy of the state as expressed in its Constitution, statutes and decisions." *Id.* Where the state's Constitution provides for bringing suit against the state only in state court, the statutory power of the state's attorney

general, "to appear and defend actions brought against the state or its officials [cannot] be deemed to confer on that officer power to consent to suit against the state. . . ." *Id.* at 468. The *Ford Motor Co.* Court reviewed Indiana's Constitution and statutes, and determined that Indiana's Attorney General was not authorized to waive the State's immunity. *Id.* at 467.[10]

In this case, the Eleventh Circuit correctly applied *Ford Motor Co.*, interpreted Georgia law and concluded that Georgia's Attorney General does not have the authority to waive Georgia's Eleventh Amendment immunity. (Pet. App. 6a). See GA. CONST. Art. I, § II, Para. IV(e),(f), reprinted in 2 Ga. Code Ann. (1996 Supp.) ("(e) . . . The sovereign immunity of the state and its departments and agencies can **only** be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver. . . . (f) **No** waiver of sovereign immunity under this Paragraph shall be construed as a waiver of any immunity provided to the state or its departments,

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[10] In *Ford Motor Co.* the State conceded that it had waived its immunity by its litigation conduct if its Attorney General had authority to waive the State's immunity. It is unclear why the State conceded this point. One could speculate that, since the case was litigated prior to the rejection of the implied waiver doctrine, *College Savings Bank v. Fla. Prepaid Postsecondary Educ.*, 527 U.S. 666 (1999) and prior to the Court's allowing the immunity defense to be raised for the first time on appeal, *Edelman v. Jordan*, 415 U.S. 551 (1974), the State simply failed to raise these arguments.

agencies, officers, or employees by the United States Constitution." (emphasis added).[11]

In order for a state legislature to provide for its attorney general to waive its immunity from suit, it would need to do so expressly.[12] If a state legislature cannot, except by express terms, waive the state's Eleventh Amendment immunity, *see Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985), it stands to reason that, when empowering an executive official to waive the state's immunity, such a declaration must be just as clear.

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[11] Georgia, like most states creates an Office of the Attorney General to represent the state in matters of civil and criminal litigation:

> "The Attorney General shall act as the legal advisor of the executive department, shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor, and shall perform such other duties as shall be required by law."

GA. CONST. Art. 5, § 3 ¶ IV. (App. 2A-4A). These duties are enumerated further in O.C.G.A. § 45-15-3 and are limited to representation and advice for the state, its agencies and employees. (App. 4a). This is not dissimilar to the duties assigned to state attorneys general across the country. (State statutes attached as App. 18a-86a).

[12] In fact, at least one state, Alaska, has provided its attorney general with authority to waive its Eleventh Amendment immunity. The Alaska code provides, "Before January 1, 1999, the attorney general may, in a case that involves the state's title to submerged lands, or in any case in which the state seeks to allocate fault to the federal government or a federal employee under *AS 09.17.080*, waive the state's immunity from suit in federal court provided under the Eleventh Amendment to the Constitution of the United States." Alaska Stat. § 44.23.020(3)(c), (App. 19a-20a).

See College Savings Bank, 572 U.S. at 676; *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-579 (1946); *Ford Motor Co.*, 323 U.S. at 465. State legislatures may have the power to waive the state's Eleventh Amendment immunity and may be able to vest that authority in the attorney general. But Georgia has not made a clear declaration that its Attorney General has such authority.

The United States asserts that "*Ford* is difficult to reconcile in principle with other cases that treat a State's litigation conduct in federal court as a waiver" without consideration of the authority of the State's attorney to waive. (U.S. Br. p. 7). It urges the Court to consider overruling *Ford Motor Co.*, or at least to limit it to only those situations where the state is brought into federal court through a coercive process and then fails to raise its immunity until a late stage in the proceeding. (U.S. Br. pp. 2-26). Lapides, although less direct, also suggests that *Ford Motor Co.* is "unreliable." (Pet. Br. p. 35). *Id.* To the contrary, the *Ford Motor Co.* rule is sound and should be preserved.

The *Ford Motor Co.* rule preserves the core of the Eleventh Amendment by reserving to the states the right to determine the authority of their officers and the power to limit where they will be sued. The suit involved a claim against the state for back taxes. In finding against a waiver, the Court noted that while a state may authorize "a suit against itself to do justice in its own courts to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the federal courts to be astute to read the consent to embrace federal as well as state courts. . . . " *Ford Motor Co.*, 323 U.S. at 465. The Court cautioned against "judicial interference in

the vital field of financial administration [absent] a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation. . . . " *Id.* Application of a "waiver-by-removal" rule ignores the intentions of the states as to the power of their own officers, and results in the federal court's adjudication of state law claims against the wishes of the States.

Additionally, *Ford Motor Co.* is consistent with a properly limited interpretation of *Clark*, *Gunter* and *Gardner*. As noted above, *Clark* and *Gardner* do not involve a true waiver of sovereign immunity; the States did not defend themselves from claims asserted by others, but rather the States asserted claims of their own. And *Ford* itself found that *Gunter* is distinguishable due to the state's distinct statutory authorizations and administrative interpretations. *Id.* at 464. *Gunter* is further distinguishable as noted above due to the injunctive nature of the suit and the extended acquiescence of the state to the court order.

Should the Court overrule its holding in *Ford Motor Co.*, two things are likely to occur. First, the Court will be repeatedly faced with deciding what specific conduct by the states' attorneys general amounts to a waiver of the Eleventh Amendment. Second, states will be forced to limit the litigation conduct of their lawyers. Most states generally authorize their attorneys general to defend the state in all matters of litigation. (See state statutes in App. 18a-86a). If *Ford Motor Co.* is overruled, states and their attorneys general will be forced to guess as to what conduct may be deemed a waiver in order to avoid accidentally waiving the Eleventh Amendment. If the states

guess wrong, the Eleventh Amendment would be waived despite a clear contrary intent. This Court has never adopted a rule that would allow for the accidental waiver of a constitutional right.

Finally, a determination that *Ford Motor Co.* does not apply to the case at bar would unjustifiably treat state legislatures with less respect than Congress with regard to the authority they grant to executive officers to waive sovereign immunity. It is the longstanding precedent of this Court that the Attorney General and other executive officers of the federal government do not have authority to waive the federal government's immunity:

> It is a fundamental principle . . . , that no suit can be maintained against the United States, or against their property, in any court, without express authority of Congress. . . . Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers.

Stanley v. Schwalby, 162 U.S. 255, 270 (1896). If the federal government cannot be subject to liability as a result of the actions or authority of its executive officers, the states should be afforded the same protection.

The United States suggests that the authority of the United States Attorney General and other officers of the federal executive branch of government to waive has little bearing on the authority of the attorneys general of the various states. (U.S. Br. pp. 18-19 n.6). According to the United States, the federal Constitution vests the

exclusive authority to waive the United States' sovereign immunity in the legislative branch. By contrast, it argues that the federal Constitution does not provide a similar basis for limiting the state's waiver authority to the state legislature. *Id.* This attempt by the United States to narrow the scope of the States' immunity while shielding itself from such narrowing must fail. The Court has already established that when reviewing issues of a state's waiver of immunity it is proper to use the standard of the federal government's immunity as an example. *College Savings Bank*, 527 U.S. at 682; *see also California v. Deep Sea Research*, 523 U.S. 491 (1998) ("this Court has recognized a correlation between sovereign immunity principles applicable to States and the Federal Government"). If it is appropriate to look to the United States Constitution to determine what branch of government is authorized to waive the United States' immunity, it is equally appropriate to look to the constitutions of the various states to determine what branch of government is authorized to waive the states' immunity.

CONCLUSION

For the above and foregoing reasons, the State of Georgia respectfully urges this Court to affirm the decision of the Eleventh Circuit Court of Appeals and to find that a state does not waive its Eleventh Amendment immunity by removing a case to federal court.

Respectfully submitted,

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28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgement it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject

matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

GA. CONST. Art. 1, § 2, Para. IX. Sovereign immunity and waiver thereof; claims against the state and its departments, agencies, officers, and employees.

(a) The General Assembly may waive the state's sovereign immunity from suit by enacting a State Tort Claims Act, in which the General Assembly may provide by law for procedures for the making, handling, and disposition of actions or claims against the state and its departments, agencies, officers, and employees, upon such terms and subject to such conditions and limitations as the General Assembly may provide.

(b) The General Assembly may also provide by law for the processing and disposition of claims against the state which do not exceed such maximum amount as provided therein.

(c) The state's defense of sovereign immunity is hereby waived as to any action ex contractu for the breach of any written contract now existing or hereafter entered into by the state or its departments and agencies.

(d) Except as specifically provided by the General Assembly in a State Tort Claims Act, all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions and

may be liable for injuries and damages if they act with actual malice or with actual intent to cause injury in the performance of their official functions. Except as provided in this subparagraph, officers and employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgement shall be entered against them, for the performance or nonperformance of their official functions. The provisions of this subparagraph shall not be waived.

(e) Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

(f) No waiver of sovereign immunity under this Paragraph shall be construed as a waiver of any immunity provided by the United States Constitution.

GA. CONST. Art. 5, § 3, Para. III. Powers, duties, compensation, and allowances of other executive officers.

Except as otherwise provided in this Constitution, the General Assembly shall prescribe the powers, duties, compensation, and allowances of the above executive officers and provide assistance and expenses necessary for the operation of the department of each.

Para. IV. Attorney General; duties.

The Attorney General shall act as the legal advisor of the executive department, shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor, and shall perform such other duties as shall be required by law.

O.C.G.A. § 45-15-3. Duties generally.

It is the duty of the Attorney General:

(1) When required to do so by the Governor, to give his opinion in writing, or otherwise, on any question of law connected with the interest of the state or with the duties of any of the departments;

(2) When he deems it advisable, to prepare all contracts and writings in relation to any matter in which the state is interested;

(3) When required to do so by the Governor, to participate in, on behalf of the state, all criminal actions in any court of competent jurisdiction when the district attorney thereof is being prosecuted, and all other criminal or civil actions to which the state is a party;

(4) To act as the legal advisor of the executive branches;

(5) To represent the state in all capitol felony actions before the Supreme Court;

(6) To represent the state in all civil actions tried in any court; and

(7) To perform such other services as shall be required of him by law.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PAUL D. LAPIDES, Plaintiff, v. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; EDWIN A. RUGG, personally and in his capacity as Vice-President for Academic Affairs at Kennesaw State University; TIMOTHY MESCON, individually and in his capacity as Dean of Kennesaw State University; and TERESA J. COVIN, a/k/a TERESA JOYCE, individually and in her capacity as Chair of the Department of Management and Entrepreneurship at Kennesaw State University, Defendants.	*	CIVIL ACTION NO. 1:00-CV-0953-TWT

PORTIONS OF: DEFENDANT BOARD OF REGENTS' RESPONSE TO PLAINTIFF'S MOTION TO REMAND

I. INTRODUCTION

Plaintiff argues that Defendants' removal of this case to federal court was defective and that the entire case

should be remanded to state court. All of Plaintiff's arguments are easily answered, however, with the result that Defendants are entitled to have Plaintiff's federal claims heard by this federal court. As to Plaintiff's state tort claims, these claims must either be dismissed or else severed and remanded to state court. (*See* Defendants' Brief In Support Of Their Motion To Dismiss, Part III, p.7).

II. DEFENDANTS HAVE NOT WAIVED THEIR RIGHT TO REMOVE.

Plaintiff argues that the inclusion of Defendants' Eleventh Amendment defense in their Answers shows that they "unequivocally reject[ed] their right to remove to federal court." (Pl. Br. p. 6) Plaintiff cites no authority for this position, however, and it is more logical to infer the contrary conclusion – that the inclusion of Defendants' Eleventh Amendment defense in their state court answers shows that Defendants fully intended to exercise their right to remove to federal court, where the defense would be relevant. Further, as will be shown below, the Eleventh Amendment defense does not apply to the § 1983 claims against the individual Defendants in their individual capacities, nor to the Title VII claim. These claims are not barred by the Eleventh Amendment, and Defendants are entitled to have them heard by this court.

PLAINTIFF IS INCORRECT IN STATING THAT ALL HIS CLAIMS ARE BARRED FROM CONSIDERATION BY THE FEDERAL COURT; THUS, ALL NON-BARRED CLAIMS CAN BE HEARD.

The State Defendants Are Entitled To Have the § 1983 Claims and the Title VII Claims Heard In Federal Court.

Therefore, even if the Title VII claim was the only basis for removal, which is not the case, the Plaintiff's statement that the Title VII claims "will be added to the within and foregoing complaint" clearly allowed Defendant to "intelligently ascertain the removability of the action." *See also Perimeter Lighting Inc. v. Karlton*, 456 F.Supp. 355 (N.D. Ga. 1978); Therefore, it necessarily follows that Defendant properly moved to dismiss all Title VII claims since said claims comprised *one* (1) basis for removal jurisdiction.

B. The Presence Of A Claim That The Eleventh Amendment May Bar Does Not Destroy Removal Jurisdiction That Would Otherwise Exist. *Wisconsin Department of Corrections v. Schacht*, ___ U.S. ___, 118 S.Ct. 2047, 141 L.Ed. 2d 364 (1998).

The United States Supreme Court has addressed almost the identical issue that is before this court and determined that the federal court has jurisdiction to hear a removable case, even though some of the claims in the case may be barred by the Eleventh Amendment. In *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed. 2d 364 (1998), the Court stated the issue and holding as follows:

> [T]he question before us is whether defendants in a case filed in a state court, with claims "arising under" federal law, can remove that case to federal court-where some claims, made against a State, are subject to an Eleventh Amendment bar. We conclude that the defendants can remove the case to a federal court and that the court can decide the nonbarred claims.

Id. at 383. In *Schacht*, the Seventh Circuit had found that the presence of even one claim barred by the Eleventh Amendment deprived the federal courts of removal jurisdiction over the entire case. *Id.* at 385. The Supreme Court vacated this decision, finding that "the presence in an otherwise removable case of a claim that the Eleventh Amendment may bar does not destroy removal jurisdiction that would otherwise exist." *Id.* at 386.

Plaintiff cites no authority for his position that raising the defense as to some claims prior to removal destroys Defendants' right to remove under Wisconsin. Thus, Plaintiff's argument stated in Part II of his brief is simply a restatement of his "waiver" argument from Part I, and as shown above, that argument is without merit.

III. CONCLUSION

For the foregoing reasons, Defendant, Board of Regents of the University System of Georgia, respectfully requests that this Court deny Plaintiff's Motion to Remand the federal claims and Plaintiff's claim for costs and attorney's fees. Defendant does not object to this court remanding the tort claims brought pursuant to the Georgia Tort Claims Act.

Respectfully submitted,

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PAUL D. LAPIDES,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; EDWIN A. RUGG, personally and in his capacity as Vice-President for Academic Affairs at Kennesaw State University; TIMOTHY MESCON, individually and in his capacity as Dean of Coles College of Business at Kennesaw State University; and TERESA J. COVIN, a/k/a TERESA JOYCE, individually and in her capacity as Chair of the Department of Management & Entrepreneurship at Kennesaw State University,

Defendants.

CIVIL ACTION
FILE NO. _____

PORTIONS OF: DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

COME NOW Defendants Board of Regents of the University System of Georgia, Edwin A. Rugg, Timothy Mescon, and Teresa J. Covin, a/k/a Teresa Joyce and within the time permitted by law, make and file this Brief in Support of their Motion to Dismiss as follows:

STATEMENT OF THE CASE

The Plaintiff in this case has filed this action against Defendants alleging unlawful discrimination and retaliation pursuant to Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000(e), *et seq.*) and that Defendants violated his right to Due Process pursuant to 42 U.S.C. § 1983. In addition, Plaintiff has brought pendent tort claims of libel and slander under the Georgia Tort Claims Act.

ARGUMENT AND CITATION OF AUTHORITY

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO HEAR THE PLAINTIFF'S COMPLAINT BECAUSE PLAINTIFF HAS FAILED TO MEET THE JURISDICTIONAL PREREQUISITE OF FILING WITHIN NINETY DAYS OF HIS RECEIPT OF A NOTICE OF RIGHT TO SUE LETTER FROM THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

II. THE FEDERAL CLAIMS AGAINST THE BOARD OF REGENTS AND THE OTHER DEFENDANTS IN THEIR OFFICIAL CAPACITIES ARE BARRED BY THE ELEVENTH AMENDMENT.

It is long established that the Eleventh Amendment bars suit against a State or one of its agencies, departments or officials, absent a waiver by the State or a valid congressional override, when the State is the real party in interest or when any monetary recovery would be paid from State funds. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). *See Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100-01 (1984). The United States

Supreme Court has construed the Eleventh Amendment jurisdictional bar to extend to federal suits against a non-consenting state "by her own citizens as well as citizens of another state." *Port Authority Trans-Hudson v. Feeney*, 495 U.S. 299 (1990) (quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984)) (*Pennhurst II*).

The State of Georgia has not consented to be sued under 42 U.S.C. § 1983. In order to evidence such consent, there must be an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985). The Georgia Constitution provides that "[n]o waiver of sovereign immunity . . . shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution." Ga. Const. Art. 1, 2, Para. 9(f), reprinted in 2 Ga. Code Ann. (1996 Supp.). Therefore, the State of Georgia has not waived the immunity provided it and its officials under the Eleventh Amendment.

The Eleventh Amendment is an absolute bar to damage actions against a State and its officers, acting in their official capacities, in federal court under 42 U.S.C. §1983. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). The United States Supreme Court has determined that Congress did not intend for § 1983 to disturb the immunity to States provided by the Eleventh Amendment and alter the federal-state balance. *Will*, 491 U.S. at 65 (citing *Quern v. Jordan*, 440 U.S. 332 (1979)). The statutory language of 42 U.S.C. §§ 1983 and 1985 proscribes certain actions by a "person" or "persons" which violate the

rights of others. The Supreme Court has ruled that "person" in this context is to be given its ordinary meaning, and that, more specifically, "a State is not a person within the meaning of § 1983." *Will*, 491 U.S. at 65. A "State" includes State agencies and local government entities that are considered "arms of the State." *Id.* at 70. *See Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 276 (1977). It also includes State officers and employees sued under § 1983 in their official capacities, since such an action "is no different from a suit against the State itsself." *Will*, 491 U.S. at 71; *Carr v. City of Florence*, 916 F.2d 1521, 1525 (11th Cir. 1990). The ruling is consistent with the long-standing holdings of the Supreme Court that the Eleventh Amendment bars suits by private parties in federal court against a state, its agencies or employees sued in their official capacities "seeking to impose a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). *See Papasan v. Allain*, 478 U.S. 265 (1986); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

In this case, the Plaintiff is suing the Board of Regents, and Edwin Rugg, Timothy Mescon, and Teresa Covin, in their official capacities, for damages. The Board of Regents is an agency of the State. Pursuant to the Eleventh Amendment, any claims against Board of Regents and the other Defendants, in their official capacities, are barred and the claims must be dismissed as a matter of law.

III. THE TORT CLAIMS AGAINST THE STATE EMPLOYEES AND THE BOARD OF REGENTS MUST ALSO BE DISMISSED OR SEVERED AND REMANDED TO STATE COURT, AS THE STATE HAS NOT WAIVED ITS ELEVENTH AMENDMENT IMMUNITY FROM SUIT IN FEDERAL COURT.

As stated previously, the Eleventh Amendment bars suit against a State or one of its agencies, departments or officials, absent a waiver by the State or a valid congressional override, when the State is the real party in interest or when any monetary recovery would be paid from State funds. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). *See Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100-01 (1984); *DeKalb County School District v. Schrenko*, 109 F.3d 680, 687 (11th Cir. 1997); *Silver v. Baggiano*, 804 F.2d 1211, 1213-14 (11th Cir. 1986). The Eleventh Amendment provides: "The Judicial power to the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." United States Constitution, Amendment XI. The United States Supreme Court has construed the Eleventh Amendment jurisdictional bar to extend to federal suits against a non-consenting state "by her own citizens as well as citizens of another state." *Port Authority Trans-Hudson v. Feeney*, 495 U.S. 299 (1990) (quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984)) (*Pennhurst II*).

The State of Georgia has not consented to be sued in tort in federal court. Rather, the General Assembly of the State of Georgia expressly preserved the State's Eleventh

Amendment immunity when it enacted the Georgia Tort Claims Act ("GTCA"): "The state waives its sovereign immunity only to the extent and in the manner provided in [the GTCA] and only with respect to actions brought in the courts of the State of Georgia. The state does not waive any immunity with respect to actions brought in the courts of the United States." O.C.G.A. § 50-21-23(b). In addition, the Georgia Constitution provides that "[n]o waiver of sovereign immunity . . . shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution." Georgia Constitution, Article I, Section II, Paragraph IX(f). *See also, Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 465-66 (1945); and *Henderson v. Carter*, 229 Ga. 876 (1972). Therefore, the State of Georgia has not waived the immunity provided it and its officials under the Eleventh Amendment.

It is a long-standing holding of the United States Supreme Court that the Eleventh Amendment bars suits by private parties in federal court against a state, its agencies or employees sued in their official capacities "seeking to impose a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). *See Papasan v. Allain*, 478 U.S. 265 (1986); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Fincher v. Florida Dept. of Labor & Employment Sec. Unemployment Appeals Comm'n*, 798 F.2d 1371, 1372 (11th Cir. 1986), *cert denied*, 479 U.S. 1072 (1987) (§ 1985); *Harden v. Adams*, 760 F.2d 1158 (11th Cir. 1985) (§ 1983); *Fouche v. Jekyll Island State Park Auth.*, 713 F.2d 1518, 1520 (11th Cir. 1983) (§ 1983). Furthermore, a claim

for damages is a claim for retrospective relief which is barred by the Eleventh Amendment. *Edelman*, 415 U.S. at 667-68.

There are only two ways in which a state's Eleventh Amendment immunity may be abrogated: (1) Congress may waive a state's immunity by explicit Congressional enactment; or (2) a state may itself waive its Eleventh Amendment immunity and consent to be sued in Federal Court. *Gamble v. Florida Department of Health and Rehabilitation Servs.*, 779 F.2d 1509, 1512 (11th Cir. 1986). With regard to the tort claims in the present case, Congress has not waived the State's immunity from suit in federal court nor has the State by its own actions waived that immunity. A waiver of immunity should be found only if there is an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1984). The State of Georgia has not only given no indication that the State intends to consent to federal jurisdiction, but rather, the State of Georgia has expressly preserved its Eleventh Amendment immunity, as noted above.

The Board of Regents is a state agency, and its employees are state employees, with the result that they are not subject to the jurisdiction of this Court in connection with the claims brought against them under the Georgia Tort Claims Act. Therefore, the Plaintiff's tort claims in this case should either be dismissed pursuant to the Eleventh Amendment for lack of federal jurisdiction, or severed and remanded to the State Court of Cobb County.

IV. THE 42 U.S.C. § 1983 CLAIMS AGAINST EDWIN RUGG, TIMOTHY MESCON AND TERESA COVIN ARE BARRED BY THE DOCTRINE OF QUALIFIED IMMUNITY AND JUDGMENT SHOULD BE ENTERED ON DEFENDANTS' BEHALF AS A MATTER OF LAW.

V. 42 U.S.C. § 1983 WILL NOT SUPPORT A CLAIM UNDER A VICARIOUS LIABILITY THEORY.

VI. PLAINTIFF HAS NOT STATED A CLAIM FOR A VIOLATION OF HIS RIGHT TO DUE PROCESS.

Respectfully Submitted,

State Constitution and Statutory Provisions Relating to the Creation of and Duties for the States' Attorneys General

Alabama

Constitution:
ALA. CONST. sec. 112. Composition; officers enumerated.

The executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county.

Code:
Ala. Code sec. 36-15-1 (in relevant part). Duties generally.

(2) He or she shall attend, on the part of the state, to all criminal cases pending in the Supreme Court or Court of Criminal Appeals, and to all civil actions in which the state is a party in the Supreme Court or Court of Civil Appeals. He or she shall also attend to all cases other than criminal that may be pending in the courts of this state, in which the state may be in any manner concerned, and shall appear in the courts of other states or of the United States, in any case in which the state may be interested in the result.

The duties imposed by this section upon the Attorney General and his or her assistants shall be performed by the Attorney General personally or by his or her assistants under his or her supervision, direction, and control.

Any statute to the contrary notwithstanding, no attorney shall represent the State of Alabama, or any agency,

department, or instrumentality of the state in any litigation in any court or tribunal unless the attorney has been appointed as a deputy attorney general or assistant attorney general.

shall be paid by the state in the same manner as is now or hereafter may be provided for printing and

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Alaska

Constitution:
ALASKA CONST. art. 3, sec. 22

The Department of Law is part of the Executive Branch of the Alaska State Government. The Attorney General is appointed by the Governor of Alaska and serves as the legal advisor for the Governor and other state officers. The duties and powers of the Attorney General are found AS 44.23.020.

Code:
Alaska State sec. 44.23.020. (in relevant part). Duties; and powers; waiver of immunity.

(1) defend the Constitution of the State of Alaska and the Constitution of the United States of America;

(2) bring, prosecute, and defend all necessary and proper actions in the name of the state for the collection of revenue;

(3) represent the state in all civil actions in which the state is a party;

(c) Before January 1, 1999, the attorney general may, in a case that involves the state's title to submerged lands, or

in any case in which the state seeks to allocate fault to the federal government or a federal employee under *AS 09.17.080* , waive the state's immunity from suit in federal court provided under the Eleventh Amendment to the Constitution of the United States. The expiration on January 1, 1999, of the attorney general's authority to waive the state's Eleventh Amendment immunity does not affect existing waivers in ongoing cases.

Arizona

Constitution:
ARIZ. CONST. art. 5, sec. 1. Executive department; state officers; terms; election; residence and office at seat of government; duties. (Version amended by 1992 Proposition 100)

A. The executive department shall consist of the governor, secretary of state, state treasurer, attorney general, and superintendent of public instruction, each of whom shall hold office for four years beginning on the first Monday of January, 1971 next after the regular general election in 1970.

B. The person having the highest number of the votes cast for the office voted for shall be elected, but if two or more persons have an equal and the highest number of votes for the office, the two houses of the legislature at its next regular session shall elect forthwith, by joint ballot, one of such persons for said office.

C. The officers of the executive department during their terms of office shall reside at the seat of government where they shall keep their offices and the public records,

books, and papers. They shall perform such duties as are prescribed by the constitution and as may be provided by law.

Code:
Ariz. Rev. Stat. sec. 41-192 to 196. (in relevant part) Powers and duties of attorney general; restrictions on state agencies as to legal counsel; exceptions.

4. Represent school districts and governing boards of school districts in any lawsuit involving a conflict of interest with other county offices.

5. Represent political subdivisions, school districts and municipalities in suits to enforce state or federal statutes pertaining to antitrust, restraint of trade or price-fixing activities or conspiracies, provided that the attorney general shall notify in writing such political subdivisions, school districts and municipalities of the attorney general's intention to bring any such action on its behalf. At any time within thirty days after such notification, such political subdivisions, school districts and municipalities may, by formal resolution of its governing body, withdraw the authority of the attorney general to bring the intended action on its behalf.

4. Compromise or settle any action or claim by or against this state or any department, board or agency thereof. Where such compromise or settlement involves a particular department, board or agency of this state, the compromise or settlement shall be first approved by such department, board or agency. Where no department or agency is named or otherwise materially involved, the approval of the governor shall be first obtained.

D. The powers and duties of a bureau, subdivision or unit shall be limited to those assigned by law to the department.

Ariz. Rev. Stat. sec. 41-193. (in relevant part) Department of law; composition; powers and duties.

A. The department of law shall be composed of the attorney general and the subdivisions of the department created as provided in this article. Unless otherwise provided by law the department shall:

1. Prosecute and defend in the supreme court all proceedings in which the state or an officer thereof in his official capacity is a party.

2. At the direction of the governor or when deemed necessary by the attorney general, prosecute and defend any proceeding in a state court other than the supreme court in which the state or an officer thereof is a party or has an interest.

3. Represent the state in any action in a federal court, the cost thereof and the expenses of the attorney general incurred therein to be a charge against the state.

8. Perform other duties prescribed by law.

Arkansas

Constitution:
ARK. CONST. art. 6, sec. 1. Executive officers.

The executive department of this State shall consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State and Attorney General, all

of whom shall keep their offices in person at the seat of government and hold their offices for the term of two years and until their successors are elected and qualified, and the General Assembly may provide by law for the establishment of the office of Commissioner of State Lands. [As amended by Const. Amend. 6, 1.]

Code:
Ark. Code Ann. sec. 25-16-702 (in relevant part) Representation of state agencies and officers generally – Employment of outside counsel

(a) The Attorney General shall be the attorney for all state officials, departments, institutions, and agencies. Whenever any officer or department, institution, or agency of the state needs the services of an attorney, the matter shall be certified to the Attorney General for attention.

(e) The Attorney General shall have authority to initiate civil lawsuits under all state and federal environmental protection statutes.

Ark. Code Ann. sec. 25-16-703 (in relevant part) Representation of state interests in federal courts

(a) The Attorney General shall maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts and shall be the legal representative of all state officers, boards, and commissions in all litigation where the interests of the state are involved.

Representation of state interests in Supreme Court – Writs of quo warranto

(a) The Attorney General shall attend the several sittings of the Supreme Court and shall maintain and defend the interests of the state in all matters before that tribunal.

(d) The Attorney General is given authority, in cases where he deems it for the best interest of the state to do so, to make any compromises of delinquent taxes or moneys, as herein described, as in his judgment shall secure for the state the most advantageous settlement.

Ark. Code Ann. sec. 25-16-709 (in relevant part). Suits against officers indebted to state

(a) The Attorney General is authorized and empowered, and it is made his duty, to institute and prosecute all suits in behalf of the state against all officers of the state who are indebted to the state by reason of any moneys collected or received and not accounted for according to law.

California

Constitution:
CAL. CONST. art. 5, sec. 11

The Lieutenant Governor, Attorney General, Controller, Secretary of State, and Treasurer shall be elected at the same time and places and for the same term as the Governor. No Lieutenant Governor, Attorney General, Controller, Secretary of State, or Treasurer may serve in the same office for more than 2 terms.

CAL. CONST. art. 5, sec. 13

Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the

State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office.

Colorado

Constitution:
COLO. CONST. art. 4, sec. 1. Officers-terms of office.

(1) The executive department shall include the governor, lieutenant governor, secretary of state, state treasurer, and attorney general, each of whom shall hold his office for the term of four years, commencing on the second Tuesday of January in the year 1967, and each fourth year thereafter. They shall perform such duties as are prescribed by this constitution or by law.

(2) In order to broaden the opportunities for public service and to guard against excessive concentrations of power, no governor, lieutenant governor, secretary of state, state treasurer, or attorney general shall serve more than two consecutive terms in such office. This limitation on the number of terms shall apply to terms of office beginning on or after January 1, 1991. Any person who succeeds to the office of governor or is appointed or elected to fill a vacancy in one of the other offices named in this section, and who serves at least one-half of a term of office, shall be considered to have served a term in that office for purposes of this subsection (2). Terms are considered consecutive unless they are at least four years apart.

Code:
Colo. Rev. Stat. sec. 24-31-101 (in relevant part). Powers and duties of attorney general.

(1) (a) The attorney general of the state shall be the legal counsel and advisor of each department, division, board, bureau, and agency of the state government other than the legislative branch. He shall attend in person at the seat of government during the session of the general assembly and term of the supreme court and shall appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor, and he shall prosecute and defend for the state all causes in the appellate courts in which the state is a party or interested.

Connecticut

Constitution:
The Connecticut Attorney General was officially established in 1897.

Code:
Conn. Gen. Stat. sec. 3-125 (in relevant part).

The Attorney General shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which prosecuting officers have direction. He shall appear for the state, the Governor, the Lieutenant Governor, the Secretary, the Treasurer and the Comptroller, and for all heads of departments and state boards, commissioners, agents, inspectors, committees, auditors, chemists, directors, harbor masters, and institutions and for the State Librarian in all suits and other civil proceedings, except upon criminal recognizances and bail bonds, in which the state is a party or is interested, or in which the official acts and doings of said officers are called in question, and for all members of the state House of Representatives and the state Senate in all suits and other civil proceedings brought against them involving their official acts and doings in the discharge of their duties as legislators, in any court or other tribunal, as the duties of his office require; and all such suits shall be conducted by him or under his direction.

Delaware

Constitution:
DEL. CONST. art. 3, sec. 21. Election and term of office for certain state officers.

The terms of the Office of the Attorney General, the Insurance Commissioner, the Auditor of Accounts and the State Treasurer shall be 4 years. These officers shall be chosen by the qualified electors of the State at general elections, and be commissioned by the Governor.

Code:
Del. Code Ann. tit. 29, sec. 2504 (in relevant part).

(2) Notwithstanding any other laws, to provide legal advice, counsel and services for administrative offices, agencies, departments, boards, commissions and officers of the state government concerning any matter arising in connection with the exercising of their official powers or duties and to publish or cause to be published such opinions in book form every 2 years.

(3) Notwithstanding any other laws, to represent as counsel in all proceedings or actions which may be brought on behalf of or against them in their official capacity in any court, except in actions in which the State has a conflicting interest, all officers, agencies, departments, boards, commissions and instrumentalities of state government;

District of Columbia

D.C. Code Ann. sec. 404. Establishment of the Office of Attorney General.

(a) (1) There is established within the State of New Columbia government an Office of the Attorney General for the State of New Columbia headed by an Attorney General

(2) The Attorney General shall be appointed by the Governor with the advice and consent of the House of Delegates. The Attorney General shall serve at the pleasure of the Governor for a term of 4 years coterminous with the term of the office of the Governor as set by section 401. At the expiration of the term of office of the Attorney General, the Governor may appoint an Acting Attorney General to serve for no longer than 120 days. If the Governor fails to submit a nomination for Attorney General within 60 days of the expiration of the prior Attorney General's term of office, the Governor shall be deemed to have submitted the nomination of the Acting Attorney General to the House of Delegates for appointment pursuant to this subsection.

(3) A vacancy in the office of the Attorney General shall be filled in the same manner in which the original appointment is made. Any person so appointed to fill such a vacancy shall serve only for the remainder of the unexpired term of his or her predecessor

(4) No person may be nominated as Attorney General of the State of New Columbia unless he or she:

(A) Is a citizen of the United States;

(B) Is an active member of the unified bar created pursuant to the rules of the State of New Columbia Court of Appeals and, for the five years immediately preceding nomination, has been engaged in the active practice of

law in the State of New Columbia, has been on the faculty of a law school in the State of New Columbia, or has been employed as a lawyer by the United States or the State of New Columbia government; and

(C) Is a bona fide resident of the State of New Columbia and has maintained an actual place of abode in the State of New Columbia for at least ninety days immediately prior to nomination, and shall retain such residency as long as he or she serves as such Attorney General of the State of New Columbia.

(5) The Attorney General for the State of New Columbia shall be the chief legal officer for the State of New Columbia and have charge of all law business of the State of New Columbia. In the performance of such duties he or she shall:

(A) Have charge of the prosecution of all violations of the laws of the State of New Columbia;

(B) Have charge and conduct of all civil actions, suits or proceedings instituted by and against the State of New Columbia or its agencies or entities (including the independent agencies upon their request), or in which the State of New Columbia is concerned, including all actions in which the constitutionality or validity of the laws of the State of New Columbia are challenged;

(C) Render written legal opinions and advice to the Governor, the House of Delegates, and the heads of agencies and entities of the State of New Columbia government (including the independent agencies upon their request), which opinions, in the absence of specific action by the Governor or act of the House of Delegates to the

contrary, or until overruled by controlling court decision, shall be the guiding statement of law, to be followed by all State of New Columbia executive branch officers and employees in the performance of their official duties;

(D) Render, upon request, written legal opinions and advice on matters pertaining to the State of New Columbia to the President and Congress of the United States;

(E) Make recommendations to the Governor with respect to the pardon or the commutation of the sentences of persons convicted of crimes against the State of New Columbia;

(F) Develop criminal justice and law enforcement policies and assist the Governor, as directed, in the implementation of these policies;

(G) Perform all functions granted to or vested in the Corporation Counsel of the District of Columbia by law prior to the effective date of this constitution;

(H) Have the authority to appoint special counsel for a particular purpose or designated proceeding and to determine the compensation, powers, duties, and the length and manner of service of such special counsel; and

(I) Perform such other functions that the Governor may from time to time delegate to him or her.

(b) All prisoners convicted in a State of New Columbia court for any offense, including violations of municipal regulations and ordinances, shall be committed for their terms of imprisonment, and to such types of institutions as the court may direct, to the custody of the Attorney General of the State of New Columbia or his or her authorized representative, who shall designate the places

of confinements where the sentences of all such persons shall be served.

(c) The Attorney General for the State of New Columbia shall appoint a Marshal of the State of New Columbia who will assist the courts of the State of New Columbia and whose duties shall be as more fully prescribed by the House of Delegates

Code:
D.C. Code Ann. sec. 1-301.111 (in relevant part). Duties of Corporation Counsel [Formerly § 1-361]

The Corporation Counsel shall be under the direction of the Mayor, and have charge and conduct of all law business of the said District, and all suits instituted by and against the government thereof.

Florida

Constitution:

FLA. CONST. art. 4, sec. 4. Cabinet.

(a) There shall be a cabinet composed of a secretary of state, an attorney general, a comptroller, a treasurer, a commissioner of agriculture and a commissioner of education. In addition to the powers and duties specified herein, they shall exercise such powers and perform such duties as may be prescribed by law.

(b) The secretary of state shall keep the records of the official acts of the legislative and executive departments.

(c) The attorney general shall be the chief state legal officer. There is created in the office of the attorney

general the position of statewide prosecutor. The statewide prosecutor shall have concurrent jurisdiction with the state attorneys to prosecute violations of criminal laws occurring or having occurred, in two or more judicial circuits as part of a related transaction, or when any such offense is affecting or has affected two or more judicial circuits as provided by general law. The statewide prosecutor shall be appointed by the attorney general from not less than three persons nominated by the judicial nominating commission for the supreme court, or as otherwise provided by general law.

(d) The comptroller shall serve as the chief fiscal officer of the state, and shall settle and approve accounts against the state.

(e) The treasurer shall keep all state funds and securities and shall disburse state funds only upon the order of the comptroller. Such order may be in any form and may require the disbursement of state funds by electronic means or by means of a magnetic tape or any other transfer medium.

(f) The commissioner of agriculture shall have supervision of matters pertaining to agriculture except as otherwise provided by law.

(g) The commissioner of education shall supervise the public education system in the manner prescribed by law.

Code:
Fla. Stat. sec. 160.01 (in relevant part).

(4) Shall appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested,

in the Supreme Court and district courts of appeal of this state.

(5) Shall appear in and attend to such suits or prosecutions in any other of the courts of this state or in any courts of any other state or of the United States. This subsection is not intended to authorize the joinder of the Attorney General as a party in such suits or prosecutions.

Fla. Stat. sec. 16.015 (in relevant part). Legal services; Department of Legal Affairs, other counsel.

The Department of Legal Affairs shall be responsible for providing all legal services required by any department, unless otherwise provided by law.

Hawaii

Constitution:
HAW. CONST. art. 5, sec. 6. Executive and administrative offices and departments.

All executive and administrative offices, departments and instrumentalities of the state government and their respective powers and duties shall be allocated by law among and within not more than twenty principal departments in such a manner as to group the same according to common purposes and related functions. Temporary commissions or agencies for special purposes may be established by law and need not be allocated within a principal department.

Each principal department shall be under the supervision of the governor and, unless otherwise provided in this constitution or by law, shall be headed by a single executive. Such single executive shall be nominated and, by

and with the advice and consent of the senate, appointed by the governor. That person shall hold office for a term to expire at the end of the term for which the governor was elected, unless sooner removed by the governor; except that the removal of the chief legal officer of the State shall be subject to the advice and consent of the senate.

Except as otherwise provided in this constitution, whenever a board, commission or other body shall be the head of a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. The term of office and removal of such members shall be as provided by law. Such board, commission or other body may appoint a principal executive officer who, when authorized by law, may be an ex officio, voting member thereof, and who may be removed by a majority vote of the members appointed by the governor.

The governor shall nominate and, by and with the advice and consent of the senate, appoint all officers for whose election or appointment provision is not otherwise provided for by this constitution or by law. If the manner or removal of an officer is not prescribed in this constitution, removal shall be as provided by law.

When the senate is not in session and a vacancy occurs in any office, appointment to which requires the confirmation of the senate, the governor may fill the office by granting a commission which shall expire, unless such appointment is confirmed, at the end of the next session

of the senate. The person so appointed shall not be eligible for another interim appointment to such office if the appointment failed to be confirmed by the senate.

No person who has been nominated for appointment to any office and whose appointment has not received the consent of the senate shall be eligible to an interim appointment thereafter to such office.

Every officer appointed under the provisions of this section shall be a citizen of the United States and shall have been a resident of this State for at least one year immediately preceding that person's appointment, except that this residency requirement shall not apply to the president of the University of Hawaii. [Am Const Con 1968 and election Nov 5, 1968; ren and am Const Con 1978 and election Nov 7, 1978]

Code:
Haw. Rev. sec. 26-7 (in relevant part). Department of the attorney general.

Haw. Rev. sec. 28-1 (in relevant part). Appears for State.

The attorney general shall appear for the State personally or by deputy, in all the courts of record, in all cases criminal or civil in which the State may be a party, or be interested, and may in like manner appear in the district courts in such cases.

Idaho

Constitution:
IDAHO CONST. art. 4, sec. 1. Executive officers listed-term of office-place of

Residence-duties.

The executive department shall consist of a governor, lieutenant governor, secretary of state, state controller, state treasurer, attorney general and superintendent of public instruction, each of whom shall hold his office for four years beginning on the first Monday in January next after his election, commencing with those elected in the year 1946, except as otherwise provided in this Constitution. The officers of the executive department shall, during their terms of office, reside within the state. Their official office shall be located in the county where the seat of government is located, there they shall keep the public records, books and papers. They shall perform such duties as are prescribed by this Constitution and as may be prescribed by law, provided that the state controller shall not perform any post-audit functions.

Code:
Idaho Code sec. 67-1401 (in relevant part). Duties of attorney general.

Except as otherwise provided in this chapter, it is the duty of the attorney general:

1. To perform all legal services for the state and to represent the state and all departments, agencies, offices, officers, boards, commissions, institutions and other state entities, in all courts and before all administrative tribunals or bodies of any nature. Representation shall be provided to those entities exempted pursuant to the provisions of section.

Illinois

Constitution:
ILL. CONST. art. 5, sec. 1. Officers.

The Executive Branch shall include a Governor, Lieutenant Governor, Attorney General, Secretary of State, Comptroller and Treasurer elected by the electors of the State. They shall keep the public records and maintain a residence at the seat of government during their terms of office. (Source: Illinois Constitution.)

Code:
15 Ill. Comp. Stat. 205/4 (in relevant part). The duties of the Attorney General shall be –

First – To appear for and represent the people of the State before the supreme court in all cases in which the State or the people of the State are interested. Notwithstanding this provision, the Office of Public Counsel shall be authorized to represent the interests of the people of the State in all proceedings pertinent to utility regulation, including cases before the supreme court, where any such case is properly brought by the Office pursuant to its statutory duties and powers.

Second – To institute and prosecute all actions and proceedings in favor of or for the use of the State, which may be necessary in the execution of the duties of any State officer.

Third – To defend all actions and proceedings against any State officer, in his official capacity, in any of the courts of this State or the United States.

Indiana

Code:
Ind. Code sec. 4-6-1-2 (in relevant part). Office created-Election-Term-Time for taking office.

There is created the office of attorney general for the state to be administered by an attorney general who shall be elected under IC 3-10-2-6 by the voters of the state. The term of office of the attorney general is four (4) years, beginning on the second Monday in January after election and continuing until a successor is elected and qualified.

Ind. Code sec. 4-6-1-6 (in relevant part).

All of the rights, powers, and duties conferred by law upon the attorney-general are conferred upon the attorney-general created by this chapter; in addition thereto, the attorney-general shall consult with and advise the several prosecuting attorneys of the state in relation to the duties of their office, and when, in his judgment, the interest of the public requires it, he shall attend the trial of any party accused of an offense, and assist in the prosecution; and shall represent the state in any matter involving the rights or interests of the state, including actions in the name of the state, for which provision is not otherwise made by law.

(Formerly: Acts 1941, c.109, s.6.) As amended by Acts 1978, P.L.2, SEC.402

Iowa

Constitution:
IOWA CONST. art. 5, sec. 12. Attorney general.

The general assembly shall provide, by law, for the election of an attorney general by the people, whose term of office shall be four years, and until his successor is elected and qualifies.

Repealed and rewritten 1972, Amendment [32]

IOWA CONST. art. 5, sec. 13 (in relevant part). Department of justice.

The department of justice, with the attorney general as head thereof, shall be located at the seat of government.

13.2 Duties. (in relevant part).

It shall be the duty of the attorney general, except as otherwise provided by law to:

1. Prosecute and defend all causes in the appellate courts in which the state is a party or interested.

2. Prosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in the attorney general's judgment, the interest of the state requires such action, or when requested to do so by the governor, executive council, or general assembly.

3. Prosecute and defend all actions and proceedings brought by or against any state officer in the officer's official capacity.

4. Prosecute and defend all actions and proceedings brought by or against any employee of a judicial district

department of correctional services in the performance of an assessment of risk pursuant to chapter 692A.

Kansas

Constitution:
KAN. CONST. art. 1, sec. 1. Executive officers; selection; terms.

The constitutional officers of the executive department shall be the governor, lieutenant governor, secretary of state, and attorney general, who shall have such qualifications as are provided by law. Such officers shall be chosen by the electors of this state at the time of voting for members of the legislature in the year 1974 and every four years thereafter, and such officers elected in 1974 and thereafter shall have terms of four years which shall begin on the second Monday of January next after their election, and until their successors are elected and qualified. In the year 1974 and thereafter, at all elections of governor and lieutenant governor the candidates for such offices shall be nominated and elected jointly in such manner as is prescribed by law so that a single vote shall be cast for a candidate for governor and a candidate for lieutenant governor running together, and if such candidates are nominated by petition or convention each petition signature and each convention vote shall be made for a candidate for governor and a candidate for lieutenant governor running together. No person may be elected to more than two successive terms as governor nor to more than two successive terms as lieutenant governor.

Code:
Kan. Stat. Ann. sec. 75-702 (in relevant part). Duties in actions where state a party or interested; or when the constitutionality of a law is at issue.

The attorney general shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and shall also, when required by the governor . . .

Kan. Stat. Ann. sec. 75-708. Performance of other duties required by law. The attorney general shall perform such other duties as may be required of him or her by law.

Kentucky

Constitution:
Ky. Const. sec. 91. Constitutional State Officers.

A Treasurer, Auditor of Public Accounts, Commissioner of Agriculture, Labor and Statistics, Secretary of State, and Attorney General, shall be elected by the qualified voters of the State at the same time the Governor and Lieutenant Governor are elected, for the term of four years, each of whom shall be at least thirty years of age at the time of his election shall have been a resident citizen of the State at least two years next before his election. The duties of all these officers shall be such as may be prescribed by law, and the Secretary of State shall keep a fair register of and attest all the official acts of the Governor, and shall, when required, lay the same and all papers, minutes and vouchers relative thereto before either House of the General Assembly. The officers named in

this section shall enter upon the discharge of their duties the first Monday in January after their election, and shall hold their offices until their successors are elected and qualified. Text as Ratified on: November 3, 1992.

Code:
Ky. Rev. Stat. Ann. sec. 15.020 (in relevant part). Chief law officer and adviser.

Duty to attend to litigation, write opinions, draft writings – shall appear for the Commonwealth in all cases in the Supreme Court or Court of Appeals wherein the Commonwealth is interested, and shall also commence all actions or enter his appearance in all cases, hearings, and proceedings in and before all other courts, tribunals, or commissions in or out of the state, and attend to all litigation and legal business in or out of the state required of him by law, or in which the Commonwealth has an interest, and any litigation or legal business that any state officer, department, commission, or agency may have in connection with, or growing out of, his or its official duties, except where it is made the duty of the Commonwealth's attorney or county attorney to represent the Commonwealth.

Louisiana

Constitution:
La. Const. art. 4, sec. 8. Attorney General; Powers and Duties.

There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. The attorney general shall be elected for a term

of four years at the state general election. The assistant attorneys general shall be appointed by the attorney general to serve at his pleasure. As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action.

The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law.

Code:
La. Rev. Stat. Ann. sec. 36:702 (in relevant part). Powers and duties of attorney general.

In addition to the functions, powers, and duties otherwise vested in the attorney general, he shall:

(1) Represent the public interest in the administration of this Chapter and shall be responsible to the legislature and the public therefor.

(7) Do such other things, not inconsistent with law, as are necessary to perform properly the functions vested in him.

Maine

Constitution:
ME. REV. STAT. CONST. art. 9 sec. 11. Attorney General.

The Attorney General shall be chosen biennially by joint ballot of the Senator and Representatives in convention. Vacancy in said officer occurring when the Legislature is not in session, may be filled by appointment by the Governor, subject to confirmation as required by this Constitution for Justices of the Supreme Judicial Court.

Code:
Me. Rev. Stat. Ann. tit. 5, sec. 191 (in relevant part). Duties; salary; fees; full time.

The Attorney General, a deputy, assistant, or staff attorney shall appear for the State, the head of any state department, the head of any state institution and agencies of the State in all civil actions and proceedings in which the State is a party or interested, or in which the official acts and doings of the officers are called in question, in all the courts of the State; and in such actions and proceedings before any other tribunal when requested by the Governor or by the Legislature or either branch thereof. All such actions and proceedings shall be prosecuted or defended by the Attorney General or under the Attorney General's direction. Writs, summonses or other processes served upon such officers shall forthwith be transmitted by them to the Attorney General. All legal services required by such officers, boards and commissions in matters relating to their official duties shall be rendered by the Attorney General or under the Attorney General's direction.

Maryland

Constitution:
MD. CONST. art. 5, sec. 2

All elections for Attorney-General shall be certified to, and returns made thereof by the Clerks of the Circuit Courts for the several counties, and the Clerk of the Superior Court of Baltimore City, to the Governor of the State, whose duty it shall be to decide on the election and qualification of the person returned; and in case of a tie between two or more persons, to designate which of said persons shall qualify as Attorney-General, and to administer the oath of office to the person elected.

MD. CONST. art. 5, sec. 3. Powers and duties of Attorney-General; compensation; Governor not to employ additional counsel unless authorized by legislature

(a) The Attorney General shall:

(1) Prosecute and defend on the part of the State all cases pending in the appellate courts of the State, in the Supreme Court of the United States or the inferior Federal Courts, by or against the State, or in which the State may be interested, except those criminal appeals otherwise prescribed by the General Assembly.

(2) Investigate, commence, and prosecute or defend any civil or criminal suit or action or category of such suits or actions in any of the Federal Courts or in any Court of this State, or before administrative agencies and quasi legislative bodies, on the part of the State or in which the State may be interested, which the General Assembly by law or joint resolution, or the Governor, shall have

directed or shall direct to be investigated, commenced and prosecuted or defended.

(3) When required by the General Assembly by law or joint resolution, or by the Governor, aid any State's Attorney or other authorized prosecuting officer in investigating, commencing, and prosecuting any criminal suit or action or category of such suits or actions brought by the State in any Court of this State.

(4) Give his opinion in writing whenever required by the General Assembly or either branch thereof, the Governor, the Comptroller, the Treasurer or any State's Attorney on any legal matter or subject.

(b) The Attorney General shall have and perform any other duties and possess any other powers, and appoint the number of deputies or assistants, as the General Assembly from time to time may prescribe by law.

(c) The Attorney General shall receive for his services the annual salary as the General Assembly from time to time may prescribe by law, but he may not receive any fees, perquisites or rewards whatever, in addition to his salary, for the performance of any official duty.

(d) The Governor may not employ any additional counsel, in any case whatever, unless authorized by the General Assembly.

Code:
Md. STATE GOVERNMENT Code Ann. sec. 6-103 (in relevant part).

(a) There is an Attorney General of the State, as provided in Article V, § 2 of the Maryland Constitution.

Code:
Md. STATE GOVERNMENT Code Ann. sec. 6-106 (in relevant part).

(a) Except as otherwise provided by law, the Attorney General has general charge of the legal business of the State.

(b) Except as otherwise provided by law, the Attorney General is the legal adviser of and shall represent and otherwise perform all of the legal work for each officer and unit of the State government.

Code:
Md. STATE GOVERNMENT Code Ann. sec. 6-107 (in relevant part).

(a) The Attorney General is the legal adviser of and shall represent and otherwise perform all of the legal work for:

(1) the Board of Supervisors of Elections of Baltimore City;

(2) the Board of Liquor Commissioners of Baltimore City; and

(3) the Sheriff of Baltimore City.

(b)(1) The Attorney General may advise or represent a political subdivision of the State or any of its officers, employees, or agents as to a matter that relates to State or federal antitrust law.

(2) Representation under this subsection may include an appearance in an action or administrative proceeding to defend the subdivision, officer, employee, or agent.

Massachusetts

Constitution:
MASS. CONST. Ann. Pt. 2, C. II, sec. I., art. IX. Judicial Officers, etc., How Nominated and Appointed.

All judicial officers, [the attorney-general,] the solicitor general, [all sheriffs,] coroners, [and registers of probate,] shall be nominated and appointed by the governor, by and with the advice and consent of the council; and every such nomination shall be made by the governor, and made at least seven days prior to such appointment.

MASS. CONST. Ann. Amend. art. XVII. Election and Tenure of Secretary, Treasurer, Auditor and Attorney-General.

The secretary, treasurer and receiver-general, auditor, and attorney-general, shall be chosen [annually], on the day in November prescribed for the choice of governor; and each person then chosen as such, duly qualified in other respects, shall hold his office for the term of [one year] from the third Wednesday in January next thereafter, and until another is chosen and qualified in his stead. The qualification of the voters, the manner of the election, the return of the votes, and the declaration of the election, shall be such as are required in the election of governor. In case of a failure to elect either of said officers on the day in November aforesaid, or in case of the decease in the meantime of the person elected as such, such officer shall be chosen on or before the third Wednesday in January next thereafter from the [two persons who had the highest number of votes for said offices on the day in November aforesaid] people at large, by joint ballot of the senators and representatives in one room; and in case the office of secretary, or treasurer and receiver-general, or

auditor, or attorney-general shall become vacant from any cause during an annual or special session of the general court, such vacancy shall in like manner be filled by choice from the people at large; but if such vacancy shall occur at any other time, it shall be supplied by the governor by appointment, with the advice and consent of the council. The person so chosen or appointed, duly qualified in other respects, shall hold his office until his successor is chosen and duly qualified in his stead. In case any person chosen or appointed to either of the offices aforesaid, shall neglect, for the space of ten days after he could otherwise enter upon his duties, to qualify himself in all respects to enter the discharge of such duties, the office to which he has been elected or appointed shall be deemed vacant. No person shall be eligible to either of said offices unless he shall have been an inhabitant of this commonwealth five years next preceding his election or appointment.

Code:
Mass. Gen. Laws. Ann. sec. 12:3 (in relevant part). Appearances for commonwealth, prosecution or defense; rendering of legal services.

The attorney general shall appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the commonwealth, except upon criminal recognizances and bail bonds, and in such suits and proceedings before any other tribunal, including the prosecution of claims of the commonwealth against the United States, when requested by the governor or by the general court or either branch

thereof. All such suits and proceedings shall be prosecuted or defended by him or under his direction. Writs, summonses or other processes served upon such officers shall be forthwith transmitted by them to him. All legal services required by such departments, officers, commissions and commissioners of pilots for district one in matters relating to their official duties shall, except as otherwise provided, be rendered by the attorney general or under his direction.

Mass. Gen. Laws Ann. sec. 12:3E (in relevant part). Defense of actions against officers or employees.

Upon the filing with the attorney general of a written request by an officer or employee of any agency within the executive office of health and human services or the department of education, that the attorney general defend him in any action alleging an intentional or unintentional tort or other wrongful act or omission, or violation of the civil rights of any person under any federal or state law, arising out of the operation of said agencies within the executive office of health and human services or of the department of education, the attorney general shall, if after investigation it appears to him that such officer or employee was at the time the cause of action arose acting within the scope of his official duties of employment, take over the management and defense of such action. The attorney general may adjust or settle any such action at any time before, during or after trial, if he finds after investigation that the plaintiff is entitled to damages from such officer or employee.

Mass. Gen. Laws Ann. sec. 12:5 (in relevant part). Civil actions to recover money for commonwealth.

All civil actions to recover money for the commonwealth may be brought in the name of the commonwealth by the attorney general or by a district attorney.

Michigan

Constitution:
MICH. CONST. art. 5, sec. 3 (in relevant part). Single heads of departments; appointment, term.

The head of each principal department shall be a single executive unless otherwise provided in this constitution or by law. The single executives heading principal departments shall include a secretary of state, a state treasurer and an attorney general. When a single executive is the head of a principal department, unless elected or appointed as otherwise provided in this constitution, he shall be appointed by the governor by and with the advice and consent of the senate and he shall serve at the pleasure of the governor.

When a board or commission is at the head of a principal department, unless elected or appointed as otherwise provided in this constitution, the members thereof shall be appointed by the governor by and with the advice and consent of the senate. The term of office and procedure for removal of such members shall be as prescribed in this constitution or by law.

Terms of office of any board or commission created or enlarged after the effective date of this constitution shall not exceed four years except as otherwise authorized in this constitution. The terms of office of existing boards and commissions which are longer than four years shall

not be further extended except as provided in this constitution.

History: Const. 1963, art. V, § 3, Eff. Jan. 1, 1964

Code:
Mich. Comp. Laws sec. 14.28 (in relevant part). Attorney general; prosecution and defense of cases in supreme court; solicitor general; intervention or appearance for state on request or own motion.

The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party; when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.

Mich. Comp. Laws sec. 14.29 (in relevant part). Suits involving state departments.

It shall be the duty of the attorney general, at the request of the governor, the secretary of state, the treasurer or the auditor general, to prosecute and defend all suits relating to matters connected with their departments.

Minnesota

Constitution:
MINN. CONST. art. 5, sec. 1. Executive officers.

The executive department consists of a governor, lieutenant governor, secretary of state, auditor, and attorney general, who shall be chosen by the electors of the state.

The governor and lieutenant governor shall be chosen jointly by a single vote applying to both offices in a manner prescribed by law. [Amended, November 3, 1998] NOTE: The office of the state treasurer will be abolished on the first Monday in January 2003. Laws 1998, chapter 387, article 1, section 2.

Code:
Minn. Stat. sec. 8.01 (in relevant part). Appearance.

The attorney general shall appear for the state in all causes in the supreme and federal courts wherein the state is directly interested; also in all civil causes of like nature in all other courts of the state whenever, in the attorney general's opinion, the interests of the state require it.

Mississippi

Constitution:
Miss. Const. Ann. art. 6, sec. 173. Attorney-general.

There shall be an attorney-general elected at the same time and in the same manner as the governor is elected, whose term of office shall be four years and whose compensation shall be fixed by law. The qualifications for the attorney-general shall be the same as herein prescribed for judges of the circuit and chancery courts.

Code
Miss. Code Ann. sec. 9-4-3 (in relevant part).

Miss. Code Ann. sec. 7-5-39 (in relevant part). Qualification, election, and duties

He shall have the powers of the Attorney General at common law and is given the sole power to bring or

defend a lawsuit on behalf of a state agency, the subject matter of which is statewide interest, and he shall intervene and argue the constitutionality of any statute when notified of a challenge thereto, pursuant to the Mississippi Rules of Civil Procedure. His qualifications for office shall be as provided for chancery and circuit judges in Section 154 of the Mississippi Constitution.

Miss. Code Ann. sec 7-5-39 (in relevant part). To represent the state and state officers in suits.

The attorney general shall also represent the state, in person or by his assistant, as counsel in all suits against the state in other courts than supreme court at the seat of government, and he shall, in like manner, act as counsel for any of the state officers in suits brought by or against them in their official capacity, touching any official duty or trust and triable at the seat of government. He may pursue the collection of any claim or judgement in favor of the state outside of the state.

Missouri

Constitution:
Mo. Const. art. 4, sec. 12. Executive department, composition of-elective officials-departments and offices enumerated.

The executive department shall consist of all state elective and appointive officials and employees except officials and employees of the legislative and judicial departments. In addition to the governor and lieutenant governor there shall be a state auditor, secretary of state,

attorney general, a state treasurer, an office of administration, a department of agriculture, a department of conservation, a department of natural resources, a department of elementary and secondary education, a department of higher education, a department of highways and transportation, a department of insurance, a department of labor and industrial relations, a department of economic development, a department of public safety, a department of revenue, a department of social services, and a department of mental health. In addition to the elected officers, there shall not be more than fifteen departments and the office of administration. The general assembly may create by law two departments, in addition to those named, provided that the departments shall be headed by a director or commission appointed by the governor on the advice and consent of the senate. The director or commission shall have administrative responsibility and authority for the department created by law. Unless discontinued all present or future boards, bureaus, commissions and other agencies of the state exercising administrative or executive authority shall be assigned by law or by the governor as provided by law to the office of administration or to one of the fifteen administrative departments to which their respective powers and duties are germane.

Code:
Mo. Rev. Stat. sec. 27-050 (in relevant part). To appear in supreme court and court of appeals, when

The attorney general shall appear on behalf of the state in the court of appeals and in the supreme court and have the management of and represent the state in all appeals to which the state is a party other than misdemeanors

and those cases in which the name of the state is used as nominal plaintiff in the trial court.

Mo. Rev. Stat. sec. 27-060 (in relevant part). To represent state in other cases.

The attorney general shall institute, in the name and on behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved.

Montana

Constitution:
MONT. CONST. art. 6, sec. 1. Officers.

(1) The executive branch includes a governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, and auditor.

(2) Each holds office for a term of four years which begins on the first Monday of January next succeeding election, and until a successor is elected and qualified.

(3) Each shall reside at the seat of government, there keep the public records of his office, and perform such other duties as are provided in this constitution and by law.

Code:
Mont. Code Ann. sec. 2-15-501 (in relevant part).

(1) to prosecute or defend all causes in the supreme court in which the state or any officer of the state in the officer's official capacity is a party or in which the state has an interest;

(2) to represent the state in all bankruptcy proceedings in which the state's interest may be affected and in other debt collection proceedings at the request of a state agency;

(3) after judgment in any of the causes referred to in subsections (1) and (2), to direct the issuing of a process as may be necessary to carry the judgment into execution;

Nebraska

Constitution:
NEB. CONST. art. 4, sec. 1. Executive departments; officers; when elected; terms; eligibility; books to be kept at seat of government; residence of officers; heads of departments; appointments.

The executive officers of the state shall be the Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, State Treasurer, Attorney General, and the heads of such other executive departments as set forth herein or as may be established by law. The Legislature may provide for the placing of the above named officers as heads over such departments of government as it may by law establish . . . :

Code:
Neb. Rev. Stat. sec. 81-8, 218 (in relevant part). Attorney General; authority.

The Attorney General shall represent the state and employees of the state in any suit brought under the State Tort Claims Act and is authorized to compromise or settle any such suit with the approval of the court in which such suit is pending.

Neb. Rev. Stat. sec. 81-8, 239.06 (in relevant part). Civil action against state officer or employee; Attorney General; represent; cooperation required; payment for defense; when required.

(1) If any civil action is brought against any state officer or employee, such state official or employee may file a written request for counsel with the Attorney General asserting that such civil action is based in fact upon an alleged act or omission in the course and scope of employment. If any state officer or employee is requested to appear before a tribunal and the state may have an interest, such state official or employee may file a written request for representation at the tribunal by the Attorney General asserting that the request to appear is based upon an alleged act or omission in the course and scope of employment. The Attorney General shall thereupon appear and defend or represent that person unless after investigation he or she finds that the claim or demand does not arise out of an alleged act or omission occurring in the course and scope of employment or that the act or omission complained of amounted to malfeasance in office or willful or wanton neglect of duty, in which case the Attorney General shall give that person written notice that defense of the claim or representation before the tribunal has been rejected.

Nevada

Constitution:
NEV. CONST. art. 5, sec. 22. Duties of certain state officers

The secretary of state, state treasurer, state controller, attorney general, and superintendent of public instruction shall perform such other duties as may be prescribed by law.

Code:
Nev. Rev. Stat. Ann. sec. 228.110 (in relevant part).

1. The attorney general and his duly appointed deputies shall be the legal advisers on all state matters arising in the executive department of the state government.

New Hampshire

Constitution:
N.H. CONST. PART SECOND (Form of Government)(46). Nomination and Appointment of Officers.

All judicial officers, the attorney general, and all officers of the navy, and general and field officers of the militia, shall be nominated and appointed by the governor and council; and every such nomination shall be made at least three days prior to such appointment; and no appointment shall take place, unless a majority of the council agree thereto.

Code:
N.H. Rev. Stat. Ann. sec. 21-m:5 (in relevant part).

I. Represent the public interest in the administration of the department of justice and be responsible to the governor, the general court, and the public for such administration.

II. The duties of the bureau shall include, but not be limited to, the following:

(a) Providing advice and legal representation in civil matters for all executive branch agencies;

(b) Providing advice and legal representation for the state in land acquisition matters;

(c) Regulating charitable trusts, as provided for by RSA 7:19 through 7:32-a.

New Jersey

Constitution:
N.J. CONST. art. 5, sec. 4, para. 1

Updated Through Amendments Adopted in November, 2000

1. All executive and administrative offices, departments, and instrumentalities of the State government, including the offices of Secretary of State and Attorney General, and their respective functions, powers and duties, shall be allocated by law among and within not more than twenty principal departments, in such manner as to group the same according to major purposes so far as practicable. Temporary commissions for special purposes may, however, be established by law and such commissions need not be allocated within a principal department.

Code:
N.J. STAT. sec. 52:17A-1 (in relevant part). Purpose of act.

Department established; appointment and term of Attorney-General

There is hereby established a Department of Law in the State Government.

N.J. STAT. sec. 52:17A-4 (in relevant part). Powers and duties of Division of Law

The powers and duties of the Division of Law shall be the powers and duties now or hereafter conferred upon or required of the Attorney General, either by the Constitution or by the common and statutory law of the State, and as specifically but not exclusively as detailed herein, to wit:

e. Act as the sole legal adviser, attorney or counsel, notwithstanding the provisions of any other law, for all officers, departments, boards, bodies, commissions and instrumentalities of the State Government in all matters other than those requiring the performance of administrative functions entailing the enforcement, prosecution and hearing of issues as imposed by law upon them; and represent them in all proceedings or actions of any kind which may be brought for or against them in any court of this State; and shall likewise interpret all statutes and legal documents, inspect and approve contracts and titles and otherwise control their legal activities;

g. Attend generally to all legal matters in which the State or any officer, department, board, body, commission or instrumentality of the State Government is a party or in which its rights or interests are involved;

New Mexico

Constitution:
N.M. CONST. art. 5, sec. 1. Composition of department; terms of office members; residing and maintaining records at seat of government.

The executive department shall consist of a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and commissioner of public lands, who shall, unless otherwise provided in the constitution of New Mexico, be elected for terms of four years beginning on the first day of January next after their election. The governor and lieutenant governor shall be elected jointly by the casting by each voter of a single vote applicable to both offices.

Such officers shall, after having served two terms in a state office, be ineligible to hold that state office until one further term has been intervened.

The officers of the executive department, except lieutenant governor, shall during their terms of office, reside and keep the public records, books, papers and seals of office at the seat of government.

Upon the adoption of this amendment by the people, the terms provided for in this section shall apply to those officers elected at the general election in 1990 and all state executive officers elected thereafter.

Code:
N.M. Stat. Ann. sec. 8-5-1 (in relevant part). Creation of department of justice.

That the department of justice be, and same is hereby created, with the attorney general as head thereof, which shall be located at the seat of government.

N.M. Stat. Ann. Sec. 8-5-2 (in relevant part). Duties of attorney general.

Except as otherwise provided by law, the attorney general shall:

A. prosecute and defend all causes in the supreme court and court of appeals in which the state is a party or interested;

B. prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor;

C. prosecute and defend all actions and proceedings brought by or against any state officer or head of a state department, board or commission, or any employee of the state in his official capacity;

New York

Constitution:
NY CLS Const. art. 5, sec. 1. Comptroller and attorney-general; payment of state moneys without audit void.

The comptroller and attorney-general shall be chosen at the same general election as the governor and hold office for the same term, and shall possess the qualifications provided in section 2 or [of] * article IV. The legislature

shall provide for filling vacancies in the office of comptroller and of attorney general. No election of a comptroller or an attorney-general shall be had except at the time of electing a governor.

NY CLS Const. art. 5, sec. 4. Department heads.

The head of the department of audit and control shall be the comptroller and of the department of law, the attorney-general. . . .

Code:
NY CLS Exec. sec. 63 (in relevant part). General duties.

1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state, but this section shall not apply to any of the military department bureaus or military offices of the state.

North Carolina

Constitution:
N.C. Const. art. 3, sec. 7. Other elective officers.

A Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Commissioner of Labor, and a Commissioner of Insurance shall be elected by the qualified voters of the State in 1972 and every four years thereafter, at the same time and places as members of the General Assembly are elected. Their term of office shall be four years and shall commence on the first day of

January next after their election and continue until their successors are elected and qualified.

Code:
N.C. Gen. Stat. sec. 114-2 (in relevant part). Duties.

It shall be the duty of the Attorney General:

(1) To defend all actions in the appellate division in which the State shall be interested, or a party, and to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested.

(2) To represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State.

North Dakota

Constitution:
N.D. Const. art. 5, sec. 2

The qualified electors of the state at the times and places of choosing members of the legislative assembly shall choose a governor, lieutenant governor, agriculture commissioner, attorney general, auditor, insurance commissioner, three public service commissioners, secretary of state, superintendent of public instruction, tax commissioner, and treasurer. The legislative assembly may by law provide for a department of labor to be administered by a public official who may be either elected or appointed.

The powers and duties of the agriculture commissioner, attorney general, auditor, insurance commissioner, public

service commissioners, secretary of state, superintendent of public instruction, tax commissioner, and treasurer must be prescribed by law. If the legislative assembly establishes a labor department, the powers and duties of the officer administering that department must be prescribed by law.

Code:
N.D. Cent. Code sec. 54-12-01 (in relevant part). Attorney general – Duties.

The attorney general shall:

1. Appear for and represent the state before the supreme court in all cases in which the state is interested as a party.

2. Institute and prosecute all actions and proceedings in favor or for the use of the state

which may be necessary in the execution of the duties of any state officer.

3. Appear and defend all actions and proceedings against any state officer in his official capacity in any of the courts of this state or of the United States. If both parties to an action are state officers, the attorney general may determine which officer he will represent and the other officer may employ counsel to represent him.

Ohio

Constitution:
Ohio Const. art. 3, sec. 1. Executive department.

The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state,

treasurer of state, and an attorney general, who shall be elected on the first Tuesday after the first Monday in November, by the electors of the state, and at the places of voting for members of the general.

Code:
Ohio Rev. Code Ann. sec. 9.41 (in relevant part).

§ 109.02 Duties as chief law officer.

The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested. When required by the governor or the general assembly, the attorney general shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested.

Oklahoma

Constitution:
OKLA. CONST. art. 6, sec. 1. Executive officers enumerated – Offices and records – Duties.

A. The Executive authority of the state shall be vested in a Governor, Lieutenant Governor, Secretary of State, State Auditor and Inspector, Attorney General, State Treasurer, Superintendent of Public Instruction, Commissioner of Labor, Commissioner of Insurance and other officers provided by law and this Constitution, each of whom shall keep his office and public records, books and papers at the seat of government, and shall perform such duties as may be designated in this Constitution or prescribed by law.

Code:
Okla. Stat. tit. 74, sec. 18b (in relevant part). Duties of Attorney General – Counsel of Corporation Commission as representative on appeal from Commission.

A. The duties of the Attorney General as the chief law officer of the state shall be:

1. To appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court and Court of Criminal Appeals in which the state is interested as a party;

2. To appear for the state and prosecute and defend all actions and proceedings in any of the federal courts in which the state is interested as a party;

10. To institute actions to recover state monies illegally expended, to recover state property and to prevent the illegal use of any state property, upon the request of the Governor or the Legislature;

16. To institute civil actions against members of any state board or commission for failure of such members to perform their duties as prescribed by the statutes and the Constitution and to prosecute members of any state board or commission for violation of the criminal laws of this state where such violations have occurred in connection with the performance of such members' official duties;

20. To represent and protect the collective interests of all utility consumers of this state in rate-related proceedings before the Corporation Commission or in any other state or federal judicial or administrative proceeding;

21. To represent and protect the collective interests of insurance consumers of this state in rate-related proceedings before the Insurance Property and Casualty Rate Board or in any other state or federal judicial or administrative proceeding;

Oregon

Code:
Or. Rev. Stat. sec. 180.010 (in relevant part). Office of Attorney General.

There is established the office of Attorney General of the State of Oregon.

Or. Rev. Stat. sec. 180.060 (in relevant part). Powers and duties of Attorney General.

(1) The Attorney General shall:

(a) Appear for the state in the trial of all civil and criminal causes in the Supreme Court or the Court of Appeals in which the state may be directly or indirectly interested.

(b) Appear for the state, when required by the Governor or the legislature, in any court or tribunal in any cause in which the state is a party or in which the state is directly interested.

(c) Appear, commence, prosecute or defend for the state all causes or proceedings in the Supreme Court or the Court of Appeals in which the state is a party or interested.

(d) Appear, commence, prosecute or defend any action, suit, matter, cause or proceeding in any court when

requested by any state officer, board or commission when, in the discretion of the Attorney General, the same may be necessary or advisable to protect the interests of the state.

Pennsylvania

Constitution:
Pa. Const. art. 4, sec. 1. Executive department.

The Executive Department of this Commonwealth shall consist of a Governor, Lieutenant Governor, Attorney General, Auditor General, State Treasurer, and Superintendent of Public Instruction and such other officers as the General Assembly may from time to time prescribe.

Pa. Const. art. 4, sec. 4.1. Attorney General.

An Attorney General shall be chosen by the qualified electors of the Commonwealth on the day the general election is held for the Auditor General and State Treasurer; he shall hold his office during four years from the third Tuesday of January next ensuing his election and shall not be eligible to serve continuously for more than two successive terms; he shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law.

Code:
Pa. Stat. Ann. tit. 71, sec. 732-204 (in relevant part). Legal advice and civil matters.

(3) It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the

absence of a controlling decision by a court of competent jurisdiction.

(C) Civil litigation; collection of debts. – The Attorney General shall represent the Commonwealth and all Commonwealth agencies and upon request, the Departments of Auditor General and State Treasury and the Public Utility Commission in any action brought by or against the Commonwealth or its agencies, and may intervene in any other action, including those involving charitable bequests and trusts or the constitutionality of any statute. The Attorney General shall represent the Commonwealth and its citizens in any action brought for violation of the antitrust laws of the United States and the Commonwealth. The Attorney General shall collect, by suit or otherwise, all debts, taxes and accounts due the Commonwealth which shall be referred to and placed with the Attorney General for collection by any Commonwealth agency; the Attorney General shall keep a proper docket or dockets, duly indexed, of all such claims, showing whether they are in litigation and their nature and condition. The Attorney General may, upon determining that it is more efficient or otherwise is in the best interest of the Commonwealth, authorize the General Counsel or the counsel for an independent agency to initiate, conduct or defend any particular litigation or category of litigation in his stead. The Attorney General shall approve all settlements over such maximum amounts as he shall determine arising out of claims brought against the Commonwealth pursuant to 42 Pa.C.S. § 5110.

(E) Limitations in civil litigations. The Attorney General shall not agree to the entry of a consent decree in any action against the Commonwealth or any agency without

the approval of the Governor and notice to the General Assembly through the offices of the Secretary of the Senate and the Chief Clerk of the House of Representatives.

Rhode Island

Constitution:
R.I. Const. art. 9, sec. 12. Powers and duties of secretary, attorney-general, and general treasurer.

The duties and powers of the secretary, attorney-general and general treasurer shall be the same under this Constitution as are now established, or as from time to time may be prescribed by law.

Code:
R.I. Gen. Laws sec. 42-9-1 (in relevant part). Head of department – Assistants.

(a) There shall be a department of the attorney general. The head of the department shall be the attorney general who shall have supervision over the department and shall appoint thirty (30) assistant attorneys general.

R.I. Gen. Laws sec. 42-9-6 (in relevant part). Legal adviser – Representation of state officers and agencies.

Except as otherwise in the general laws provided, the attorney general, whenever requested, shall act as the legal adviser of the individual legislators of the general assembly, of all state boards, divisions, departments, and commissions and the officers thereof, of all commissioners appointed by the general assembly, of all the general officers of the state, and of the director of administration, in all matters pertaining to their official duties, and shall

institute and prosecute, whenever necessary, all suits and proceedings which they may be authorized to commence, and shall appear for and defend the above-named individual legislators, boards, divisions, departments, commissions, *commissioners*, and officers, in all suits and proceedings which may be brought against them in their official capacity.

South Carolina

Constitution:
S.C. CONST. Ann. art. 4, sec. 15. Faithful execution of laws.

The Governor shall take care that the laws be faithfully executed. To this end, the Attorney General shall assist and represent the Governor, but such power shall not be construed to authorize any action or proceeding against the General Assembly or the Supreme Court.

Code:
S.C. Code Ann. sec. 1-7-40 (in relevant part). Appearance for State in Supreme Court and other courts and tribunals.

He shall appear for the State in the Supreme Court and the court of appeals in the trial and argument of all causes, criminal and civil, in which the State is a party or interested, and in these causes in any other court or tribunal when required by the Governor or either branch of the General Assembly.

S.C. Code Ann. sec. 1-7-50 (in relevant part). Defense of actions against public officers and employees.

In the event that any officer or employee of the State, or of any political subdivision thereof, be prosecuted in any

action, civil or criminal, or special proceeding in the courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the Attorney General, when requested in writing by any such officer or employee, to appear and defend the action or proceeding in his behalf. Such appearance may be by any member of his staff or by any solicitor or assistant solicitor when directed to do so by the Attorney General.

S.C. Code Ann. sec. 1-7-55 (in relevant part). Counterclaims, cross-actions, or other actions on behalf of public officers and employees.

When the Attorney General undertakes to defend any civil action or proceeding on behalf of any officer or employee of the State, or of any political subdivision of the State, he may, in his discretion, upon the request of the officer or employee, enter and prosecute a counterclaim, cross-action, or any other appropriate action in the suit on behalf of the officer or employee.

South Dakota

Constitution:
S.D. CONST. art. 4, sec. 7. Other executive officers – Powers and duties.

There shall be chosen by the qualified electors of the state at the general election of the Governor and every four years thereafter the following constitutional officers: attorney general, secretary of state, auditor, treasurer, and

commissioner of school and public lands, who shall severally hold their offices for a term of four years. Commencing with the 1992 general election, no person may be elected to more than two consecutive terms as attorney general, secretary of state, auditor, treasurer, or commissioner of school and public lands.

Code:
S.D. Codified Laws sec. 1-11-1 (in relevant part). General duties of attorney general. The duties of the attorney general shall be:

(1) To appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court, in which the state shall be interested as a party;

Tennessee

Constitution:
TENN. CONST. art. 7. sec. 5. Attorney general and reporter.

An Attorney General and Reporter for the State, shall be appointed by the Judges of the Supreme Court and shall hold his office for a term of eight years. An Attorney for the State for any circuit or district, for which a Judge having criminal jurisdiction shall be provided by law, shall be elected by the qualified voters of such circuit or district, and shall hold his office for a term of eight years, and shall have been a resident of the State five years, and of the circuit or district one year. In all cases where the Attorney for any district fails or refuses to attend and prosecute according to law, the Court shall have power to appoint an Attorney pro tempore.

Code:
Tenn. Code Ann. sec. 8-6-109. Duties.

(1) The trial and direction of all civil litigated matters and administrative proceedings in which the state of Tennessee or any officer, department, agency, board, commission or instrumentality of the state may be interested;

(2) To attend to all business of the state, both civil and criminal in the court of appeals, the court of criminal appeals and the supreme court;

(9) To defend the constitutionality and validity of all legislation of statewide applicability, except as provided in subdivision (b)(10), enacted by the general assembly, except in those instances where the attorney general and reporter is of the opinion that such legislation is not constitutional, in which event the attorney general and reporter shall so certify to the speaker of each house of the general assembly;

Texas

Constitution:
TEX. CONST. art. 4, sec. 22. Attorney General.

The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. He shall, whenever

sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law.

Code:
Tex. Gov't. Code sec. 402.021 (in relevant part).

The attorney general shall prosecute and defend all actions in which the state is interested before the supreme court and courts of appeals.

Utah

Constitution:
UTAH CONST. art. 7, sec 16. Duties of Attorney General.

The Attorney General shall be the legal adviser of the State officers, except as otherwise provided by this Constitution, and shall perform such other duties as provided by law.

Code:
Utah Code Ann. sec. 67-5-17 (in relevant part).

(1) perform all duties in a manner consistent with the attorney-client relationship under Section 67-5-17;

(2) except as provided in Sections 10-3-928 and 17-18-1, attend the Supreme Court and the Court of Appeals of this state, and all courts of the United States, and prosecute or defend all causes to which the state, or any officer, board, or commission of the state in an official capacity is a party; and take charge, as attorney, of all civil legal matters in which the state is interested;

(a) if civil, the nature of the demand, the stage of proceedings, and when prosecuted to judgment, a memorandum of the judgment and of any process issued whether satisfied, and if not satisfied, the return of the sheriff.

Vermont

Constitution:
VT. CONST. ch 2 sec. 43. Biennial elections.

The Governor, Lieutenant-Governor, Treasurer, Secretary of State, Auditor of Accounts, Senators, Town Representatives, Assistant Judges of the County Court, Sheriffs, High Bailiffs, State's Attorneys, Judges of Probate and Justices of the Peace, shall be elected biennially on the first Tuesday next after the first Monday of November, beginning in A.D. 1914.

Code:
Vt. Stat. Ann. tit 3 sec. 152 (in relevant part). Scope of authority.

The attorney general may represent the state in all civil and criminal matters as at common law and as allowed by statute. The attorney general shall also have the same authority throughout the state as a state's attorney.

Virginia

Constitution:
VA. CONST. art. 5, sec. 15. Attorney General.

An Attorney General shall be elected by the qualified voters of the Commonwealth at the same time and for the same term as the Governor; and the fact of his election

shall be ascertained in the same manner. No person shall be eligible for election or appointment to the office of Attorney General unless he is a citizen of the United States, has attained the age of thirty years, and has the qualifications required for a judge of a court of record. He shall perform such duties and receive such compensation as may be prescribed by law, which compensation shall neither be increased nor diminished during the period for which he shall have been elected. There shall be no limit on the terms of the Attorney General.

Code:
Va. Code Ann. sec. 2.2-507 (in relevant part).

A. All legal service in civil matters for the Commonwealth, the Governor, and every state department, institution, division, commission, board, bureau, agency, entity, official, court, or judge, including the conduct of all civil litigation in which any of them are interested, shall be rendered and performed by the Attorney General, except as provided in this chapter and except for any litigation concerning a justice or judge initiated by the Judicial Inquiry and Review Commission. No regular counsel shall be employed for or by the Governor or any state department, institution, division, commission, board, bureau, agency, entity, or official. The Attorney General may represent personally or through one or more of his assistants any number of state departments, institutions, divisions, commissions, boards, bureaus, agencies, entities, officials, courts, or judges that are parties to the same transaction or that are parties in the same civil or administrative proceeding and may represent multiple interests within the same department, institution, division, commission, board, bureau, agency, or entity.

B. The Attorney General may represent personally or through one of his assistants any of the following persons who are made defendant in any civil action for damages arising out of any matter connected with their official duties:

1. Members, agents or employees of the Alcoholic Beverage Control Board;

2. Agents inspecting or investigators appointed by the State Corporation Commission;

3. Agents, investigators, or auditors employed by the Department of Taxation;

4. Members, agents or employees of the State Mental Health, Mental Retardation and Substance Abuse Services Board, the Department of Mental Health, Mental Retardation and Substance Abuse Services, the State Board of Health, the State Department of Health, the Department of General Services, the State Board of Social Services, the Department of Social Services, the State Board of Corrections, the Department of Corrections, the State Board of Juvenile Justice, the Department of Juvenile Justice, the Virginia Parole Board, or the Department of Agriculture and Consumer Services;

5. Persons employed by the Commonwealth Transportation Board;

6. Persons employed by the Commissioner of Motor Vehicles;

7. Persons appointed by the Commissioner of Marine Resources;

8. Police officers appointed by the Superintendent of State Police;

9. Game wardens appointed by the Department of Game and Inland Fisheries;

10. Third impartial panel members appointed to hear a teacher's grievance pursuant to § 22.1-312;

11. Staff members or volunteers participating in a court-appointed special advocate program pursuant to Article 5 (§ 9.1-151 et seq.) of Chapter 1 of Title 9.1; or

12. Any emergency medical service agency that is a licensee of the Department of Health in any civil matter and any guardian ad litem appointed by a court in a civil matter brought against him for alleged errors or omissions in the discharge of his court-appointed duties.

Washington

Constitution:
WASH. CONST. art. 3, sec. 1. Executive department.

The executive department shall consist of a governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and a commissioner of public lands, who shall be severally chosen by the qualified electors of the state at the same time and place of voting as for the members of the legislature.

Code:
Rev. Code Wash. (ARCW) sec. 43.10.030 (in relevant part).

(1) Appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested;

(3) Defend all actions and proceedings against any state officer or employee acting in his official capacity, in any of the courts of this state or the United States;

West Virginia

Constitution:
W. VA. CONST. art. 3, sec. 1. Executive Department.

The executive department shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general, who shall be, ex officio, reporter of the court of appeals. Their terms of office shall be four years and shall commence on the first Monday after the second Wednesday of January next after their election. They shall reside at the seat of government during their terms of office, keep there the public records, books and papers pertaining to their respective offices and shall perform such duties as may be prescribed by law.

Code:
W. Va. Code sec. 5-3-1 (in relevant part).

The attorney general shall give written opinions and advice upon questions of law, and shall prosecute and defend suits, actions, and other legal proceedings, and generally render and perform all other legal services, whenever required to do so.

Wisconsin

Constitution:
WIS. CONST. art. 6, sec. 3. Treasurer and attorney general; duties, compensation.

The powers, duties and compensation of the treasurer and attorney general shall be prescribed by law.

Code:
Wis. Stat. sec. 165.25 (in relevant part).

(1) Represent State. Except as provided in s. 978.05 (5), appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded to any circuit court in which the state is a party; and, if requested by the governor or either house of the legislature, appear for and represent the state, any state department, agency, official, employee or agent, whether required to appear as a party or witness in any civil or criminal matter, and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested. The public service commission may request under s. 196.497 (7) that the attorney general intervene in federal proceedings. All expenses of the proceedings shall be paid from the appropriation under s. 20.455 (1) (d).

(a) At the request of the head of any department of state government, the attorney general may appear for and defend any state department, or any state officer,

employee or agent of the department in any civil action or other matter brought before a court or an administrative agency which is brought against the state department, or officer, employee or agent for or on account of any act growing out of or committed in the lawful course of an officers', employees' or agents' duties.

Wyoming

Constitution:
WYO. STAT. sec. 9-1-601. Appointment; term; removal; special assistant for legislative affairs; qualifications.

(a) The attorney general of the state of Wyoming shall be appointed by the governor with the advice and consent of the senate in accordance with W.S. 28-12-101 through 28-12-103 and may be removed by the governor as provided in W.S. 9-1-202.

(b) If a newly elected governor appoints an attorney general to take office prior to or during the legislative session next following the governor's election, the newly appointed attorney general designee shall become a member of the attorney general's staff to serve as a special assistant to the governor for legislative affairs. When the legislative session adjourns the attorney general's term of office shall terminate.

(c) Prior to his appointment, the attorney general shall have been a practicing attorney for at least four (4) years. At the date of appointment, he shall be in good standing in the courts of record of this state and shall be a resident and elector of the state.

(i) Prosecute and defend all suits instituted by or against the state of Wyoming, the prosecution and defense of which is not otherwise provided for by law;

(ii) Represent the state in criminal cases in the supreme court;

(iii) Defend suits brought against state officers in their official relations, except suits brought against them by the state;

(iv) Represent the state in suits, actions or claims in which the state is interested in either the Wyoming supreme court or any United States court;

Code:
Wyo. Stat. sec. 9-1-603 (in relevant part).

(a)(i) Prosecute and defend all suits instituted by or against the state of Wyoming, the prosecution and defense of which is not otherwise provided for by law;

(iii) Defend suits brought against state officers in their official relations, except suits brought against them by the state;

(iv) Represent the state in suits, actions or claims in which the state is interested in either the Wyoming supreme court or any United States court.

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Supreme Court, U.S.
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No. 01-298

In The

Supreme Court of the United States

PAUL D. LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

REPLY ARGUMENT

STATES WAIVE THEIR ELEVENTH AMENDMENT FORUM IMMUNITY WHEN THEY REMOVE CASES TO FEDERAL COURT

A. Forfeitures of Eleventh Amendment Immunity By a State's Litigation Conduct Are Neither Constructive Waivers Nor Offensive To States' Dignity Interests

This case presents a narrow issue for the Court's decision: whether certain kinds of litigation conduct engaged in by states, particularly the affirmative invocation of federal court jurisdiction via removal, constitute a waiver of the forum immunity that states would otherwise enjoy in federal court, under the Eleventh Amendment.

1. Georgia and its amici nonetheless attempt to raise the spectre of constructive waivers of immunity, which for some years cast a pall over this Court's Eleventh Amendment jurisprudence, and which finally were interred by this Court's decision in *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). Again, Petitioner would maintain that there is nothing constructive about a waiver of Eleventh Amendment immunity through a state's litigation conduct in affirmatively selecting federal court jurisdiction. This Court's *College Savings Bank* decision speaks emphatically to the point that when a state "voluntarily invok[es] the jurisdiction of the federal courts," that constitutes

an effective waiver of the state's Eleventh Amendment forum immunity, and is by no means to be viewed as a defective and suspect "constructive" act. See id. at 675-76, 681 n.3.

College Savings Bank likewise provides the relevant guidance as to the appropriate criterion to judge the effect of a state's waiver. While the *Edelman* and *Atascadero* standards for waiver assuredly have continued vitality and application in other contexts, for situations implicating litigation conduct, a state may waive its Eleventh Amendment immunity by either "voluntarily invok[ing]" federal court jurisdiction or making "a 'clear declaration' that it intends to submit itself to [the jurisdiction of the federal courts]." Id. at 675-76 (citing *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906), and quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)).

2. Georgia and its amici also take to task the characterization made here that the state is waiving its forum immunity from federal court jurisdiction by affirmatively invoking that jurisdiction, and that the state retains all other immunities granted to it by law. Despite this modest proposition, Respondent's amici argue that "it would offend the state's dignity to parse sovereign immunity into defeasible components and casually discard the portion of sovereign immunity exemplified by the Eleventh Amendment." (Tex. Br. 24). In so arguing, Georgia's amici mischaracterize our argument as "diminishing the significance of the Eleventh Amendment by dubbing it a mere source of 'forum immunity.'" (Tex. Br. 24).

In differentiating between "forum" and "substantive" immunity, however, Petitioner does no more than embrace both the history of the sovereign immunity the Eleventh Amendment is said to embody and the jurisprudence of this Court. By not

limiting the Eleventh Amendment strictly to its text, see, e.g., *Alden v. Maine*, 527 U.S. 706, 727 (1999), this Court has construed the Eleventh Amendment as a constitutional recognition of broad sovereign immunity states have always enjoyed. Id. at 713. The modern jurisprudence of this Court has recognized the existence of both a forum and a substantive component to both sovereign immunity and the Eleventh Amendment. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) ("a State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued" (citing *Pennhurst II*, 465 U.S. at 99)) (emphasis original); see also *Nevada v. Hall*, 440 U.S. 410, 414-15 (1979) (discussing two components of sovereign immunity). A "waiver by removal" rule simply recognizes that by affirmatively selecting the federal forum through removal, the state has chosen to forfeit the "where" component of sovereign immunity. Whether the state still enjoys the substantive protections of immunity is left to the adjudicative authority of the federal district court.

In addition, Respondents' amici urge that allowing a state to waive its forum immunity through removal, while keeping intact whatever other immunities or defenses it might have, offends "'the dignity and respect afforded a state.'" (Tex. Br. 26) (quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997)). In arguing that the state's sovereign immunity is not defeasible, amici rely on the dignitary interest this Court has recognized in cases such as *Coeur d'Alene*. However, such a dignitary interest is not offended by a rule requiring waiver of forum immunity upon removal.

In ascertaining what is protected by the State's dignitary interest, *Hans v. Louisiana*, 134 U.S. 1 (1890), is informative, given that the *Hans* Court did not have the benefit of controlling text. In finding that suits by a state's own citizens were barred

by the Eleventh Amendment, the Court quoted extensively from the Framers to determine what their beliefs were as to state immunity. John Marshall, in discussing federal court jurisdiction at the Virginia Ratification Convention, noted that "I hope that no gentleman will think that a State will be called at the bar of the federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court." Id. at 14 (citing 3 DEBATES ON THE FEDERAL CONSTITUTION 555 (J. Elliot 2d ed. 1854)). James Madison echoed Marshall's statements, noting that ". . . [i]t appears to me that this [clause] can have no operation but this – to give a citizen a right to be heard in the federal courts; and if a State should condescend to be a party, this court may take cognizance of it." Id. (citing 3 id. 533). See also *Alden v. Maine*, 527 U.S. 706, 717-18 (1999) (quoting the same statements from Marshall and Madison).

These statements from the Framing Generation show that they were concerned about states being forced to appear before the federal courts. While Petitioner does not argue that removal alters the stance of the parties such as to make a plaintiff out of a defendant, it must be the case that affirmatively seeking out a federal forum cannot be equated with being "dragged" before that court. The dignitary interests of a state, and the accompanying federalism concerns first recognized by the *Hans* Court, simply are not offended when a state defendant affirmatively seeks a federal forum through removal. Accordingly, the proffered reasons for why the various immunities held by a state must not be "defeasible" fail.

B. This Court's Decisions Indicate That a State's Invocation of Federal Court Jurisdiction is a Waiver of Eleventh Amendment Immunity

Where a state becomes a party to litigation (and irrespective of whether it is cast in the role of plaintiff, defendant, claimant, or intervenor), that suffices to reach the logical conclusion that the state has itself raised the Eleventh Amendment bar by submitting a matter to determination by a federal court. Both the *Clark* and *Gardner* opinions speak to the role of the state as "actor" in these circumstances. See *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883) (the state became "an actor as well as defendant" in the proceeding); *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947) ("[w]hen the State becomes the actor and files a claim . . . it waives any immunity which it otherwise might have. . . ."). To attempt to distinguish these cases on the basis that they do not treat the situation of a state-defendant affirmatively invoking federal court jurisdiction through removal is to miss the point entirely. It is the state's role as an actor in initiating the federal forum which provides the basis for waiver of Eleventh Amendment immunity.

Georgia's attempt (Resp. Br. 17) to limit *Gunter v. Atl. Coast Line R. Co.* to situations where a state "acquiesces" to federal court jurisdiction over a particular dispute for an extended period of time is likewise unavailing. This Court's opinion manifestly sweeps more broadly than that crabbed reading. See 200 U.S. 273, 284 (1906) ("where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment."). This Court's emphasis in *Gunter* on the voluntary nature of the state's

litigation conduct suggests the proper disposition of this case. Where a state knowingly and voluntarily invokes federal court jurisdiction, it waives any forum immunity defenses it might otherwise have. In that sense also, Georgia "acquiesced" to federal court jurisdiction over the entirety of Lapides' case when it sought, and secured, removal.[1]

Lastly, Georgia and its amici struggle mightily to distinguish this Court's decision in *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44 (1916). While Petitioner recognizes that the holding in *Richardson* and the other Puerto Rico immunity cases is complicated by the unique status that the Commonwealth holds in American federalism,[2] we are compelled – as is Respondents' amici (see Tex. Br. 12-13 n.2) – to conclude that these cases stand as strong authority for the proposition that once a state invokes federal court jurisdiction it is not free to renounce that choice. This Court in *Richardson* denied the defendant's assertion of immunity as untimely. The Court said: "Whatever might have been the merit of [defendant's] position if promptly asserted and adhered to, we hold . . . that having solemnly appeared and taken the other steps above narrated, [defendant] could not thereafter deny the court's jurisdiction." Id. at 47. Even more significantly, the

[1] That included Lapides' request for declaratory relief through judicial findings that defamatory material had been placed in his personnel files and had been inappropriately disclosed. See J.A. 17 (¶ 26).

[2] Puerto Rico is treated as a state for Eleventh Amendment purposes. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141-42 n.1 (1993) (assuming this point *arguendo*); *Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 697 (1st Cir. 1983); *see also People of Porto Rico v. Rosaly*, 227 U.S. 270, 273 (1913) ("Porto Rico . . . come[s] within the general rule exempting a government sovereign in its attributes from being sued without its consent.").

Richardson decision relied on an earlier ruling in *People of Porto Rico v. Ramos*, 232 U.S. 627 (1914), in which Puerto Rico first intervened as defendant in a case, but later asserted sovereign immunity from suit. In that case, this Court rejected the attempt to raise the immunity defense: "the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step." Id. at 632.

The litigation tactics condemned by the Court in *Ramos* more than approximate Georgia's conduct in this case. And while this Court need not consider here the situation in which a state "merely" acquiesces in federal court jurisdiction,[3] the principles enunciated in *Richardson* and *Ramos* – as well as *Clark* and *Gunter* – strongly indicate that where a state affirmatively invokes federal court jurisdiction, it waives its forum immunity in federal court, and may not later disclaim that decision.

C. Removal Unambiguously Evinces a State's Voluntary Consent to Federal Court Jurisdiction

The nub of this case remains whether removal is such a clear form of litigation conduct in invoking federal jurisdiction, so as to constitute a manifest forfeiture of the state's Eleventh Amendment immunity. Georgia and its amici raise a number of grounds suggesting that removal is not a sufficiently voluntary or consensual waiver of Eleventh Amendment immunity. None

[3] That issue seems to be presented in the Petition filed in *Montgomery v. Maryland*, 266 F.3d 334 (4th Cir. 2001), cert. filed, Docket 01-1079 (docketed Jan. 24, 2002).

of these contentions has merit.

1. The opposing briefs suggest that because removal is merely a defensive tactic, it carries with it no legal consequences in waiving a state's Eleventh Amendment forum immunity in federal court. Indeed, Respondents' amici refer to removal as a completely defensive action. (Tex. Br. 10-12, 14). However, as noted by the Respondents, removal is more appropriately characterized as one of the rare circumstances when "plaintiffs who sue a State and States being sued are both faced with a forum choice." (Resp. Br. 26). Professor Neal Miller stated it best when he wrote that "through removal, defense attorneys can make forum selection choices almost as frequently as plaintiff attorneys." Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 386 (1992). See also *Borneman v. United States*, 213 F.3d 819, 829 n.2 (4th Cir. 2000) ("We understand removal to be a forum selection procedure. . . .").

Respondents suggest that there might even be a constitutional right to removal that would be offended by a rule requiring waiver of the Eleventh Amendment upon removal to federal court. (Resp. Br. 21, n.4). However, this Court has unequivocally held that the right to removal is statutory in nature. In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816), in commenting on Congress' power to authorize removal of cases from state to federal court, the Court held that "[t]his power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power." Id. See also *Great Northern Ry. Co. v. Alexander*, 246 U.S. 276, 280 (1918) (right of removal is statutory). *Terral v. Burke Const. Co.*, 257 U.S. 529 (1922), cited by Respondents, simply stands for the rather unremarkable

proposition that a state may not condition the right to conduct business within its borders upon a waiver of the right to resort to the federal courts. Id. at 532. Indeed, Georgia's own amici apparently do not share its characterization of removal as some form of constitutional right. (See Tex. Br. 8).

Georgia thus makes a somewhat dissonant contention that removal is either a mere procedural tactic (and thus does not rise to a level of voluntary and knowing forfeiture of Eleventh Amendment immunity) or a robust constitutional right (which cannot be consensually waived). The reality is, of course, somewhere between these submissions. As already noted, Petitioner is by no means suggesting that removal somehow realigns plaintiffs into defendants and vice versa. But it is manifest that removal does act as a forum selection and an affirmative invocation of federal court jurisdiction.

2. Both Georgia and its amici strenuously maintain that the ostensible reason for the state's litigation gambit of "remove-and-claim-immunity" is to take advantage both of the federal court's expertise in section 1983 cases and of interlocutory appeals on denials of qualified immunity defenses. (See Resp. Br. 10, 20; Tex. Br. 2-3, 6-8, 27-28).

As for the intimation that federal courts have superior knowledge of the construction of federal statutes, including section 1983, this Court, at the urging of the states, has "repeatedly and emphatically" rejected the proposition that "state courts are not competent to adjudicate federal constitutional claims." *Moore v. Sims*, 442 U.S. 415, 430 (1979). Given the present volume of section 1983 litigation in state courts, "there is no intrinsic reason why the fact that a [person] is a federal judge should make him more competent, conscientious, or learned with respect to [the consideration of qualified immunity claims] that his neighbor in the state courthouse." *Stone v. Powell*, 428 U.S. 465, 493-494 n.35 (1976) (quoting Paul Bator,

Finality in Criminal Law and Federal Habeas Corpus For State Prisoners, 76 HARV. L. REV. 441, 509 (1963)), id. ("state courts, like federal courts, have an obligation . . . to uphold federal law"). As for the deeply troubling suggestion of Respondents' amici that states desire to avoid state tribunals because they often misapply federal law (see Tex. Br. 29), the answer is, of course, not to bless tactical gambits such as Georgia's here, but, rather, more stringent application of the Supremacy Clause and the wise exercise of this Court's supervisory jurisdiction in appropriate instances.

That leaves the suggestion that Georgia generously wished to confer on its employees the ability to take in federal court an interlocutory appeal from a possible denial of a qualified immunity defense, a right that is supposedly barred in state courts. But no less an authority than this Court has ruled that the right of state officials to interlocutory appeals on these issues in state court is properly a matter of state law. See *Johnson v. Fankell*, 520 U.S. 911, 919-20 (1997) ("The Idaho Supreme Court's application of the State's procedural rules in this context is thus less an interference with *federal* interests than a judgment about how best to balance the competing *state* interests of limiting interlocutory appeals and providing state officials with immediate review of the merits of their defense.") (original emphasis). And, indeed, if states wish to do so they may prescribe by rule or statute the availability of such interlocutory review. Georgia's and its amici's argument thus reduces to a peculiar complaint that state legislatures are not attentive enough to the litigation needs of state officials. It is not up to this Court to countenance such a grievance.

But what is most peculiar about Georgia's argument in this respect is that the vast majority of states *have* permitted the immediate review of denials of qualified immunity defenses. See *Arenson v. Jezwinski*, 556 N.W.2d 721, 727 n.13 (Wis.

1996) ("A majority of state courts have held that an order denying a claim of qualified immunity in a § 1983 case is immediately appealable, albeit for different reasons."); Charles D. Noland, Annotation, *Reviewability Before Trial of Order Denying Qualified Immunity to Defendant Sued in State Court Under 42 U.S.C.S. § 1983*, 49 A.L.R. 5th 717 (1997) (indicating that only 4 jurisdictions categorically reject the availability of interlocutory appeals). It should also be realized that while in Georgia a direct appeal on a denial of a qualified immunity defense is precluded, the Georgia Supreme Court has instructed that "except in clear cases, the trial courts issue a certificate of immediate review . . . for interlocutory orders denying dismissal or judgment on the basis of qualified immunity." *Turner v. Giles*, 450 S.E.2d 421, 424 (Ga. 1994).

In short, the contention that states need to be able to remove cases to federal court, without waiving their Eleventh Amendment immunity, to safeguard a supposed interest on the part of state officers to have immediate review of unfavorable qualified immunity rulings, is meritless. Under no circumstances would a state be penalized by a rule that makes removal conditioned upon a waiver of a state's Eleventh Amendment forum immunity in federal court.

3. Georgia and its amici also argue (see Resp. Br. 32; Tex. Br. 14-16) that the Court's jurisprudence regarding the parallels between federal and state sovereign immunity in the context of private suits mandates analogous treatment of the United States Attorney General and state Attorneys General. As a result, the states assert that because the U.S. Attorney General lacks the authority to waive the federal government's sovereign immunity through removal, a state Attorney General must also lack the authority to waive state sovereign immunity through removal.

This syllogistic reasoning has numerous faults. The first

is that insofar as state sovereign immunity from private suits is analogous to the corresponding federal sovereign immunity (and there are certainly significant differences and asymmetries in the doctrines), the analogy is only appropriate to the extent that the U.S. Attorney General and the state Attorneys General find themselves in parallel situations. In the case of removal from state court to federal court, however, the U.S. Attorney General and the state Attorneys General are in markedly different circumstances. When the U.S. Attorney General removes a case from state court to federal court, the United States is removing a case from the court of another sovereign to the sovereign's own court; whereas when a state Attorney General removes a case from state court to federal court, the state is removing the case from a court in which the state is sovereign to the court of another sovereign. In *Nevada v. Hall*, 440 U.S. 410 (1979), this Court recognized that the nature of sovereign immunity changes depending on whether suit is brought in a sovereign's own courts or the court of another sovereign. See id. at 414 ("The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign"). More recently, in *Alden v. Maine*, 527 U.S. 706 (1999), the Court again recognized this dichotomy observing that "a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum . . . the immunity of a sovereign in its own courts . . . [is] within the sole control of the sovereign itself." Id. at 749.

Moreover, unlike the situation where the federal government is haled into state court without consent, the state's dignity interest is not implicated here. Had the state remained in state court, it would have retained all of its sovereign powers, and accordingly all of its dignity. In this case, the state by its

own actions abandoned its sovereign forum in favor of a forum of a different sovereign. The dignitary interests that arise when the federal government is sued improperly in state court (and the resulting necessity of removal as a corrective action) simply are not present when the state originally is sued properly in its own forum.

The differences in removal, however, go beyond the different sovereign immunities implicated by a state, rather than the United States, removing. When a state removes from state court to federal court, it does so under the general removal provisions of 28 U.S.C. § 1441. This general removal is available for "*any* civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). Thus the state removes a case via the same statutory mechanism any other ordinary defendant would remove.

A state's generic ability to remove, however, should be contrasted with the more specialized removal provisions under which the U.S. Attorney General removes a case. Unlike the state's removal under the general language of section 1441, the U.S. Attorney General removes a case under 28 U.S.C. § 1442 which specifically authorizes removal for a "civil action or criminal prosecution commenced in a State court against . . . [a]ny officer of the United States or any agency thereof . . . for any act under color of such office." 28 U.S.C. § 1442(a)(1).[4] A

[4] In interpreting this provision of Section 1442, this Court has stated that the underlying rationale for allowing the federal government (and its agents) to remove a case to federal court is to allow federal defenses to be raised, especially immunity. *Mesa v. California*, 489 U.S. 121, 133 (1989) (noting "one of the most important reasons for removal [under § 1442(a)(1)] is to have the validity of the defense of official immunity tried

(continued...)

state's removal under Section 1441 thus lacks the special need requirements of Sections 1442 and 1443, but also occurs under the exact opposite circumstances.

The states' analogy to federal sovereign immunity suffers also from a flaw in its minor premise: that the United States cannot consent to federal jurisdiction through removal of a case. Yet it seems clear that were the U.S. Attorney General to remove a case to federal court, it would properly be regarded as consent for the federal tribunal to rule on the United States' other jurisdictional objections to the case or on the merits.[5] This

[4](...continued)
in a federal court.") (citing *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969)). Under Section 1442(a)(1), the basis for removal specifically is to allow the court to rule on federal immunity. Id. at 129 (confirming that "federal officer removal must be predicated on the allegation of a colorable federal defense").

Similar concerns underlie the removal provisions contained in 28 U.S.C. § 1443(1) that allow for removal of civil rights cases where a party "is denied or cannot enforce in the courts of [a] State a right under any law providing for the equal civil rights of citizens of the United States." 28 U.S.C. § 1443(1). Under the two-pronged test for removal under section 1443(1), a party must not only show that a federal law provides for specific civil rights, but also a bona fide need to be in federal court due to an inability to "'enforce' the specified federal rights 'in the courts of [the] State'." *Johnson v. Mississippi*, 421 U.S. 213, 219 (1975) (quoting 28 U.S.C. § 1443(1)) (citing *Georgia v. Rachel*, 384 U.S. 780, 803 (1966)).

[5] The only one of this Court's rulings relied upon by the states in this regard, *Minnesota v. United States*, 305 U.S. 382 (1939), is simply not apposite. The holding that removal could not constitute a waiver of federal sovereign immunity was premised on the conclusion that the case could not have even been originally brought in state court. See id. at 389 ("If Congress did not grant permission to bring this condemnation proceeding in a state court, the federal court was without jurisdiction upon its removal."). This (continued...)

would be consistent with the position advocated here by Petitioner, that states preserve their other immunities as they are consenting to a federal court's ruling on those defenses. Just as the United States could not withdraw a case from federal jurisdiction after a removal, in the event it was dissatisfied with a court's ruling, neither can states renege on their invocation of federal jurisdiction.

4. Respondents' last assertion is that a state's litigation objectives of removing-and-claiming-immunity outweigh a plaintiff's interest in a single, unitary proceeding, and such a balance is endorsed by this Court's decisions in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), and *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998). As can be discerned from the foregoing discussion, Petitioner believes that no legitimate purpose is served by Georgia's strategic use of removal in this case. But even if there were such genuine objectives, they would still not rise to the level of subverting plaintiffs' interests in having a single forum decide the common issues and claims of their cases.

Nothing in *Pennhurst* or *Schacht* is contrary to this consideration. The plaintiff in *Pennhurst* filed her suit in federal court, while Lapides filed in state court. The language in *Pennhurst* that Georgia relies upon (see Resp. Br. 22) can be seen to apply only where the state-defendant has not waived its

[5](...continued)
was expressly made consistent with the "derivative jurisdiction" rule for removals, see id., a rule that was subsequently superseded by statute. See 28 U.S.C. § 1441(e). In any event, and as has been noted by some lower courts, *Minnesota* is suspect authority for the proposition that a federal court is disabled from ruling on a matter, even where the U.S. Attorney General removes a case. See *Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1576-77 (Fed. Cir. 1995).

Eleventh Amendment immunity, since the decision seems moored to the concept of the state's dignitary interests under the Eleventh Amendment. See 465 U.S. at 106. If *Pennhurst* rests on the concept of the state's immunity in federal court as to claims against it under state law, the "intrusion" into state sovereignty with which the Court was concerned in *Pennhurst* would not appear to apply when the state is voluntarily in federal court after a plaintiff sought relief solely in state court. And while Georgia claims that "states have a vested interest in having their own courts decide issues of state law" (Resp. Br. 22), Georgia certainly had an opportunity to have its own courts decide the state law issues in the case but invoked the jurisdiction of the federal courts supposedly to benefit the individual defendants. Given that the state sought the advantages of the federal forum as to some claims, allowing it to now assert that the federal court would be intruding on its sovereignty in deciding the other claims puts Lapides, not the state, at an "unfair tactical disadvantage." See *Schacht*, 524 U.S. at 397-98 (Kennedy, J., concurring).

As for *Schacht*, the Court made quite clear that its holding went only so far as a "State's *proper* assertion of an Eleventh Amendment bar after removal means that the federal court cannot hear the barred claim." 524 U.S. at 392 (emphasis added). As Justice Kennedy pointed out in his concurrence, the Court neither reached nor considered the argument that the state waived its immunity by removing the case. See id. at 393 (Kennedy, J., concurring). Moreover, *Schacht* involved no state law claims, so the barred claims the Court recognized there were necessarily only federal claims against which the state was immune under the accepted understanding of the Eleventh Amendment. The Court did not have cause to consider the effect of the rule on state law claims originally properly filed in state court. Petitioner's removal-as-waiver argument clearly dovetails

with the Court's stated concern in *Schacht* of a "proper" assertion of the Eleventh Amendment immunity.

D. *Ford Motor*'s Authorization Requirement is Inapplicable in Removal Cases

As Petitioner discussed in his Opening Brief, *Ford Motor Co. v. Dept. of Treas. of Indiana*, 323 U.S. 459 (1945), simply is not implicated in this case. *Ford Motor* has been properly cited for the propositions that a state sued in federal court may raise its Eleventh Amendment immunity at any time during litigation, see *Edelman v. Jordan*, 415 U.S. 651, 678 (1974), and that, in suits seeking money damages that would be paid out of the state treasury, the state is the true party in interest and therefore entitled to sovereign immunity, see *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 277 (1997). These holdings of *Ford Motor* need not be disturbed should the Court adopt a rule that a state's removal of a case to federal court waives its Eleventh Amendment immunity, irrespective of the authority of the state official involved.

Georgia nonetheless asserts that a rule that a state's removal of a case to federal court waives its Eleventh Amendment immunity likely would have two undesirable consequences. (Resp. Br. 30-31). Respondents claim that under this rule, this Court would be "repeatedly faced with deciding what specific conduct by the states' attorneys general amounts to a waiver" and that states would be "forced to limit the litigation conduct of their lawyers." The Court need not spectate on this parade of horribles.

1. Should the Court adopt a rule that removal to federal court constitutes a waiver of immunity, this rule would be a clear guideline and one that both the federal courts and the states'

Attorneys General could apply straightforwardly. This rule explicitly identifies a specific litigation conduct (removal to the federal courts) with a specific litigation result (waiver of Eleventh Amendment immunity). The rule that Petitioner proposes here simply defines one example of conduct by a state that will be construed as "voluntarily invok[ing]" or as clearly declaring an intention to submit itself to the jurisdiction of the federal courts. *Coll. Sav. Bank*, 527 U.S. at 675-76.

Georgia also complains that states and their Attorneys General would be "forced to guess" as to what conduct may be deemed a waiver and that a state could take action that amounts to an "accidental waiver." (Resp. Br. 30-31). However, the rule Petitioner propounds would not allow for such "accidental waiver" of Eleventh Amendment immunity. Removal to the federal courts requires affirmative action on the part of all defendants in litigation, including states. See 28 U.S.C. § 1441. It is difficult to see how the filing of a notice of removal in a federal court and any notice to stay proceedings that may be required in state court could amount to an "accidental waiver" of immunity.

2. As for the assertion that Petitioner's submission would force states to limit the litigation conduct of their lawyers, that is precisely what should occur. The suggestion of Georgia's amici (see Tex. Br. 2, 21-22), that assistant state Attorneys General are so "politically unaccountable," unsupervised, and generally overworked, as not to be trusted with the decision to remove a case and to waive a state's Eleventh Amendment forum immunity, would be bizarrely humorous if it were not an admission against interest. The reality is that every pleading filed by a state Attorneys General office bears the name and imprimatur of the constitutional official elected or appointed to serve as the legal agent of the state. If assistant state Attorneys General need to be protected from their own inadvertence,

Petitioner might suggest stronger supervisory mechanisms should be imposed by these offices.[6] And, indeed, such supervision might properly be made by state legislatures. In this respect, Georgia's and its amici's contention that the waiver rule propounded by Petitioner would somehow reduce the stature of state legislatures in making essential sovereign immunity decisions is quite beside the point.

3. Lastly, Petitioner cannot let go unremarked the assertion by Georgia's amici (Tex. Br. 30), that this Court must not inquire into the reason or expediency of a rule of sovereign immunity in relation to particular litigation conduct engaged in by a state, even where the state itself invoked federal jurisdiction via removal of a case. But the evolving Eleventh Amendment jurisprudence of this Court has long been guided by the reason and expediency of properly balancing the legitimate sovereign interests of states with the normal expectations of private litigants. Petitioner is confident than in its wise weighing of these considerations this Court will hold that in the special and compelling circumstances presented here that a state waives its Eleventh Amendment forum immunity when it affirmatively invokes the jurisdiction of the federal courts.

[6] To its credit, Georgia does not appear to join in this contention. The names of no less than five attorneys, including Georgia's Attorney General, appeared on the original Notices of Removal filed in this case. See J.A. 6, 8. Three of these lawyers actually signed the pleadings. To maintain that all were somehow asleep at the switch, would raise a disheartening condemnation of the competence of state attorneys everywhere. This Petitioner declines to do.

CONCLUSION

For the foregoing reasons, and those articulated in Petitioner's Brief on the Merits, the judgment of the Court of Appeals for the Eleventh Circuit should be reversed and the case should be remanded for further proceedings.

Respectfully submitted,

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(8)

No. 01-298

IN THE

Supreme Court of the United States

PAUL D. LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM OF GEORGIA ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR CERES MARINE TERMINALS, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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for the Eleventh Circuit

BRIEF FOR CERES MARINE TERMINALS, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

INTEREST OF THE *AMICUS CURIAE*

Ceres Marine Terminals, Inc., is a marine terminal operator with operations in several States. It is in the midst of a long-running administrative proceeding before the Federal Maritime Administration ("FMC") against the Maryland Port Administration ("MPA"), in which the issue of Eleventh Amendment immunity was first raised after five years of litigation on the merits. That litigation included extensive discovery; a hearing before and decision by an administrative law judge; a decision by the FMC on the merits in favor of

[1] No counsel for any party had any role in authoring this brief, and no persons other than the *amicus curiae* or its counsel made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

Ceres; an MPA petition for review before the United States Court of Appeals for the Fourth Circuit; a decision by the Fourth Circuit on the merits affirming in part, reversing in part, and remanding for further proceedings; and, thereafter, further briefing before the FMC on the merits.[2]

In the briefing before the FMC on the issue of Eleventh Amendment immunity, MPA took the position, among other things, that its conduct in litigating the merits before the FMC and the Fourth Circuit did not waive MPA's immunity because neither the State Attorney General nor MPA itself was authorized by State law to waive that immunity in a federal forum. The FMC stayed further consideration of the issue pending this Court's disposition of *South Carolina State Ports Authority* v. *Federal Maritime Commission*, 243 F.3d 165 (4th Cir. 2001), *cert. granted*, No. 01-46.

In the light of these proceedings, Ceres has a strong interest in certain issues presented by this case, such as (1) under what circumstances the invocation of federal court jurisdiction waives the Eleventh Amendment immunity of a State entity and (2) whether litigation conduct by a State-entity defendant can constitute a waiver or forfeiture of Eleventh Amendment immunity if the State's attorney is not specifically authorized by the State law to waive immunity, even though the attorney is authorized to conduct litigation by and against the State and its entities.

INTRODUCTION AND SUMMARY OF ARGUMENT

The case before the Court presents the question whether a State entity may prevail on a defense of sovereign immunity

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[2] See *Ceres Marine Terminals, Inc.* v. *Md. Port Admin.*, 27 Shipping Reg. Rep. (P & F) 1251 (FMC 1997); *Md. Port Admin.* v. *FMC*, 164 F.3d 624 (table), 1998 U.S. App. LEXIS 25733, 28 Shipping Reg. Rep. 545 (4th Cir. 1998); *Ceres Marine Terminals, Inc.* v. *Md. Port Admin.*, Dkt. No. 94-01, 2001 WL 1085428 (FMC Aug. 15, 2001).

after certain conduct in litigation—in particular, the State-entity's removal of the case, originally filed in State court, to federal court. Under 28 U.S.C. § 1441, removal requires the consent of the State defendant. The Board of Regents, accordingly, voluntarily invoked the jurisdiction of the federal court and did so by specific action taken by its counsel in the course of the litigation.

There are many contexts in which private parties in federal court take the position that a State entity has waived or forfeited the defense of sovereign immunity by affirmative conduct in federal court litigation. In some cases, the State entity has taken steps that overtly invoke the jurisdiction of the federal court—such as removal (as here), initiating a proceeding a federal court, intervening in a case already in federal court, or filing a proof of claim in bankruptcy—and the waiver-of-immunity issue arises later in the proceeding with respect to a related issue, claim, or counterclaim. In others, a State entity that has been sued in federal court affirmatively seeks a ruling on the merits—such as by moving for summary judgment on the merits, going to trial on the merits, or appealing on the merits—without presenting a defense of sovereign immunity until late in the proceeding. In all these types of cases, whenever the issue of sovereign immunity is raised, the State entities regularly make two arguments in an effort to forestall a ruling that they have waived or forfeited immunity: first, that the litigation conduct does not waive or forfeit immunity because the State Attorney General or other counsel whose conduct is at issue is not authorized by State law to waive immunity, under the perceived rule of *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), and, second, that the State entity is entitled to raise the issue late in the proceeding because a State entity may raise Eleventh Amendment immunity at any time in the course of the proceedings, under another perceived rule of *Ford* echoed in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and in some other cases.

The Court should take this opportunity to make clear that neither of these arguments is valid.

First, the authority of the State Attorney General or other attorney to waive immunity under State law should be irrelevant to the assessment of the consequences of affirmative conduct in federal court litigation. Recognizing such a federal rule would bring the rule applicable to State-entities that are defendants in federal court in line with the rule applicable to State entities that intervene or file proofs of claim in ongoing federal court cases. *Clark* v. *Barnard*, 108 U.S. 436 (1883); *New York* v. *Irving Trust* Co., 288 U.S. 329 (1933); *Missouri* v. *Fiske*, 290 U.S. 18 (1933); *Gardner* v. *New Jersey*, 329 U.S. 565 (1947). Such a rule shows no disrespect to the States. State-entities often have good reason, when sued, to seek a ruling on the merits rather than to raise immunity. Permitting State entities to manipulate federal courts' Article III jurisdiction by strategic repudiation of their attorney's conduct in litigating on the merits subjects federal courts to expensive, time-consuming proceedings that may be turn out to be wasted and puts them in the position of issuing potentially advisory opinions, contrary to the fundamental principles of Article III. While Congress acting under Article I cannot abrogate a State's sovereign immunity from suit, federal courts may properly insist that State entities assert immunity before litigating on the merits and may bar State entities from later asserting that the State Attorney General lacked authority to bind the State entity to the consequences of its actions.

If applying the correct rule requires the overruling of the relevant part of *Ford*, that step should be taken. In his concurrence in *Wisconsin Department of Corrections* v. *Schacht*, 524 U.S. 381, 393 (1998), Justice Kennedy urged reconsideration of the perceived *Ford* rule that immunity may be raised at any time in a proceeding. Specifically, he urged the Court to consider ruling either that it is proper to "infer[] waiver from the failure to raise the [Eleventh Amendment]

objection at the outset of the proceedings," or that a State entity waives immunity when, "under no compulsion," it "voluntarily invokes [federal court] jurisdiction," such as by removing a case to federal court. 524 U.S. at 395. The first step in following that suggestion is to divorce the issue of waiver-by-litigation-conduct from the issue of the authority of the State's attorney under State law.

The second step in following Justice Kennedy's suggestion would be to repudiate those parts of *Ford* and of *Edelman* v. *Jordan* that permit the defense to be raised at any time in the proceedings or "for the first time on appeal." That part of *Ford* never fit well with the long-standing rule that sovereign immunity could be waived and has since been undermined by this Court's recognition that sovereign immunity does not partake enough of subject-matter jurisdiction that courts must address the issue *sua sponte* even if the State entity has not raised it. *E.g.*, *Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496, 515–16 n.19 (1982); *Wisconsin Dep't of Corrections* v. *Schacht*, 524 U.S. at 389.

The Court should also take the opportunity to make clear that it is irrelevant whether the State entity itself (as distinguished from the State Attorney General) is authorized to waive immunity as a matter of State law. Once again, there is no difference between a State entity invoking federal jurisdiction by intervening or filing a proof of claim—circumstances in which this Court has not inquired into the authority of the State entity to waive immunity—and a State entity litigating on the merits as a defendant rather than raising an available immunity defense.

Finally, the Court should rule that a State entity invoking federal court jurisdiction over a matter waives any Eleventh Amendment immunity against suit in federal court. We leave to Petitioner the argument that removing a case to federal court by itself waives that immunity. Whether or not the Court accepts Petitioner's argument, it should do nothing to

undermine Justice Kennedy's suggested rule that a State-entity defendant that does not raise its immunity defense before litigating on the merits forfeits immunity. As Justice Kennedy suggested, Eleventh Amendment immunity more closely resembles personal jurisdiction than subject-matter jurisdiction. Accordingly, a State entity lacks the right to dismissal on the basis of immunity if it has litigated on the merits without raising the defense.

ARGUMENT

I. In Determining Whether a State Entity Has Waived or Forfeited Sovereign Immunity by Conduct in Litigation, a Court Should Not Look to the Authority To Waive Immunity That State Law Confers upon the State's Attorney.

A. In this case, the Eleventh Circuit ruled that removal of the case to federal court did not waive immunity in large part because the State Attorney General lacked authority under State law to waive immunity. 251 F.3d 1372, 1374–75, 1376 (11th Cir. 2001), Pet. App. 6a, 8a.

This part of the Eleventh Circuit decision should be rejected. It only sows confusion to focus on the action of the attorney for the State entity in considering whether affirmative conduct in litigation in a federal court has waived sovereign immunity. The action is against the State entity. All actions in the litigation are taken in the name of the defendant State entity. While the State entity must necessarily act in Court through its attorneys, its conduct in litigating a federal court case is its own conduct.

Instead, the federal rule should recognize that a State may not litigate a case on the merits and then, dissatisfied with the course of proceedings, invoke sovereign immunity by asserting lack of authority to waive immunity on the part of its attorneys.

That rule would bring the rule applicable to State-entity defendants in line with the rule applicable to State entities that invoke the jurisdiction of a federal court as a claimant or intervenor. This Court has not inquired into the State law authority of the State Attorney General to waive immunity when the State has intervened in ongoing proceedings—as in *Clark* v. *Barnard*, 108 U.S. 436 (1883), and *Missouri* v. *Fiske*, 290 U.S. 18 (1933)—or filed proofs of claim in bankruptcy proceedings—as in *New York* v. *Irving Trust* Co., 288 U.S. 329 (1933), and *Gardner* v. *New Jersey*, 329 U.S. 565 (1947). A State defendant that litigates on the merits instead of promptly presenting a defense of sovereign immunity is in the same position. It is voluntarily seeking a judgment on the merits, because it has the opportunity to seek dismissal on the ground of immunity and thus to avoid any ruling on the merits. The federal rule should recognize that there is no material difference between seeking a ruling on the merits by litigating the merits without raising immunity and seeking a ruling on the merits by intervening or filing a claim in federal court.

Such a federal rule shows no disrespect to the State. State entities, in consultation with their attorneys, will often have good reason to seek a merits ruling rather than invoking Eleventh Amendment immunity. The State entity may realize that substantial prosecutorial, regulatory, or litigation resources may be wasted, or confusion and uncertainty may persist, if an important legal issue is not promptly resolved. Or a State may want to obtain a prompt merits ruling in its favor in order to further its policy or commercial interests.[3] Any of these

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[3] With the demise of the constructive waiver theory of *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), see *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), State entities will have many more opportunities than before to consider whether their commercial interests in a ruling on the merits outweigh the benefits of a dismissal on immunity grounds.

concerns may prompt a State entity to elect to defend a lawsuit presenting an important issue on the merits, rather than moving to dismiss because of sovereign immunity. A classic example is *Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496 (1982), where the State entity sought a ruling on whether exhaustion of State administrative remedies was a prerequisite to an action under 42 U.S.C. § 1983, rather than pressing for dismissal on immunity, and urged the Court to rule on the § 1983 issue even after the Court raised the immunity issue *sua sponte* at oral argument. See 457 U.S. at 515–16 n.19.[4] It shows disrespect, not respect, to distrust the State's ability to control its own attorneys and ensure that such strategic decisions are made on the basis of adequate consideration of the risks and benefits of litigation on the merits.

Moreover, this federal rule is necessary to protect the fundamental tenet of Article III that federal courts not issue advisory opinions. In a thorough opinion ruling that there is no sovereign immunity exception to claim preclusion, the Seventh Circuit pointed out that permitting a sovereign to "ignore [a prior adverse] judgment and insist that its adversary try again" is "not compatible with the Constitution, for Article III courts exercise the 'judicial Power of the United States'—which is to say, a power to enter judgments that are conclusive between the parties." *United States* v. *County of Cook, Illinois*, 167 F.3d 381, 386 (7th Cir. 1999) (Easterbrook, J.), relying, *inter alia*, on *Gunter* v. *Atlantic Coast Line Railroad*, 200 U.S. 273 (1906) (which precluded a second lawsuit by a State). Nor is it compatible with Article III to permit a sovereign to litigate on the merits and then—dissatisfied with the results—to repudiate

[4] For a more recent example, see *Montgomery* v. *Maryland*, 266 F.3d 334 (4th Cir. 2001), where the State first moved for dismissal on immunity grounds and then expressly withdrew the motion. The court of appeals ruled (in part) that respect for State sovereignty "is undermined when a federal court imposes on a state a legal argument that the state first advanced but then affirmatively withdrew." 266 F.3d at 337.

the actions of its attorney before final judgment or before disposition on appeal. In both cases, the federal judiciary would be put to the time and expense of processing a case through discovery, through preliminary rulings, and, in some cases, through trial and even appeal, only to see its judgments and opinions negated by the State entity changing its litigation strategy and invoking immunity in court. Federal courts should not permit the State to repudiate the actions of its attorneys in litigating on the merits at any time it pleases before final judgment or disposition on appeal, when it cannot do so on collateral attack after the judgment becomes final.

This suggested federal rule does not trespass on the rule of *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), that Congress cannot abrogate immunity under Article I, because the Court would simply be specifying the proper time and manner to present an immunity defense in federal courts, in the exercise of its Article III powers. Moreover, the Court has applied a federal rule to Eleventh Amendment issues in other contexts. The Court has stated, for example, that whether an entity is an "arm of the State" for sovereign immunity purposes is a question of federal law, not State law. *E.g.*, *Regents of the University of California* v. *Doe*, 519 U.S. 425, 429 n.5 (1997). Under the federal rule we propose, a State or State entity remains entirely free to assert sovereign immunity as a bar to every case in which it is sued. The federal rule does no more than tell the State that it must decide whether to invoke immunity actively before litigating on the merits.

To the extent that *Ford Motor Co., Inc.* v. *Department of the Treasury*, 323 U.S. 459 (1945), stands as an obstacle to the correct rule, it should be overruled. Justice Kennedy's concurrence in *Wisconsin Department of Corrections* v. *Schacht*, 524 U.S. 381, 393 (1998), urged reconsideration of the rules in this area of law, pointing out the unfairness of permitting a State entity to litigate on the merits as a defendant and then to raise immunity. Justice Kennedy urged that the rule

for immunity be made "more consistent with our practice regarding personal jurisdiction." 524 U.S. at 395.[5]

Reconsideration of the *Ford* rule is ripe for several reasons in addition to its manifest unfairness and conflict with Article III. *Ford* gave no adequate explanation why the conduct of the Indiana Department of the Treasury in that case—litigating on the merits through the court of appeals and raising immunity only in this Court—would constitute a waiver of immunity only if the State Attorney General were authorized under Indiana law to waive immunity. Indeed, it did not cite *Clark* v. *Barnard*, *Missouri* v. *Fiske*, or *New York* v. *Irving Trust Co.*—earlier cases involving waiver by litigation conduct (intervening or filing proofs of claim) where the Court had not looked for the attorney's authority under State law to waive immunity. The failure of explanation in *Ford* is all the more puzzling because this aspect of *Ford* was directly contrary to the Court's ruling in *Richardson* v. *Fajardo Sugar Co.*, 241 U.S. 44 (1916), where the Court, without inquiring into authority to waive immunity, unanimously ruled that the Treasurer of Puerto Rico, in a suit to recover taxes paid, could not raise Puerto Rico's immunity to suit in federal court when the argument had not been "promptly asserted and adhered to" and the Treasurer, "appearing by its Attorney General," had "solemnly appeared" and answered both the original and an amended complaint. 241 U.S. at 47. While the Court in *Ford* distinguished *Richardson* on the ground that the Court had not "consider[ed] any limitation on [the Attorney General's] powers," 323 U.S. at 469 n.14, it failed to address the fact that *Richardson* had relied on "the principles" of an earlier case, *Porto Rico* v. *Ramos*, 232 U.S. 627 (1914), in which the Court had found waiver in Puerto Rico's voluntary intervention in a

[5] *Ford* also held—or, more accurately, reiterated—that a suit against State officers for money from the State treasury is a suit against the State for Eleventh Amendment purposes. That oft-cited part of *Ford*, see, *e.g.*, *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974), would still stand.

case in which it had not been sued—a kind of litigation conduct that has never caused this Court to inquire into attorney-authority to waive immunity. 241 U.S. at 47. The Court in *Richardson* manifestly found that defending on the merits without raising immunity is analogous to intervening on the merits, as it is.[6]

Nor has this Court often followed this part of *Ford*. The only case we are aware of in which the Court again addressed the authority of a State Attorney General on the issue of waiver is *Sosna* v. *Iowa*, 419 U.S. 393, 396 n.2 (1975), where the Court *sua sponte* addressed the authority of the Iowa Attorney General to waive immunity and found such authority under Iowa law.

B. Besides ruling that attorney authority under State law to waive immunity is irrelevant to deciding when State-entity conduct in litigation waives immunity, this Court should also repudiate the perceived *Ford* rule that a State may raise an immunity defense at any stage of the proceedings.

It may not be necessary to take this additional step. Immediately after the Court in *Ford* stated that it would consider the immunity defense "even though urged for the first time in this Court," 323 U.S. at 467, the Court proceeded to address whether the State Attorney General's litigation conduct

[6] *Porto Rico* v. *Ramos* and *Richardson* were cited with approval by the Court in *United States* v. *Norwegian Barque "Thekla"*, 266 U.S. 328 (1924) (Holmes, J.), where the Court unanimously applied the principles of those cases to hold that the United States waived sovereign immunity to a judgment on a cross libel when it intervened in an admiralty case and sought a judgment on the merits. Not every intervention necessarily "invokes federal jurisdiction" so as to waive immunity. Intervention may take many different forms—from limited intervention for a specific, non-merits purpose, as in *Missouri* v. *Fiske*, to full intervention as a party.

waived immunity.[7] Doing so made sense only if waiver was a different question from ability to raise the defense. Thus, the Court could adhere to the rule that the defense of sovereign immunity may be "raised" at any stage in the proceeding, while making clear that the defense, though validly raised, may be legally insufficient where State-entity defendants have permitted their attorneys to litigate a federal case on the merits, even though their attorneys may not have possessed authority under State law to waive immunity.[8]

It would be preferable and more consistent with recent authority, however, for the Court to repudiate the *Ford* rule that immunity may be raised at any stage in a proceeding (including for the first time on appeal). This perceived rule confusingly suggests to lower courts that a State may raise immunity late in the proceedings or for the first time on appeal even after the State's attorneys have litigated a case on the merits without raising immunity as a defense.

Like the attorney-authority aspect of *Ford*, this perceived rule that immunity can be raised at any time in a proceeding has rarely been followed in this Court. One of these cases is *Sosna* v. *Iowa*, discussed above, where the Court addressed the issue *sua sponte* (and ruled that immunity had been waived). Another is *Alabama* v. *Pugh*, 438 U.S. 781 (1978) (per curiam),

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[7] As the Court next stated in *Ford*: "It is conceded by the respondents that if it is within the power of the administrative and executive officers of Indiana to waive the state's immunity, they have done so in this proceeding. The issue thus becomes one of their power under state law to do so." 323 U.S. at 467.

[8] The Ninth Circuit explained in detail the point that the issue of ability to raise immunity at any time was different from the issue of what litigation conduct should be deemed a waiver or forfeiture of immunity in *Hill* v. *Blind Industries & Services of Maryland*, 179 F.3d 754 (9th Cir. 1999), *amended*, 201 F.3d 1186 (9th Cir. 2000), in an apparent effort to be consistent with the part of *Ford* that allows immunity to be raised at any stage of the proceeding.

where the Court again addressed immunity *sua sponte* and found immunity. Another is *Edelman* v. *Jordan*, 415 U.S. 651 (1974), where the Court cited *Ford* for the proposition that immunity "need not be raised in the trial court," 415 U.S. at 678, and approved the court of appeals' decision to address the issue in those circumstances. Other cases merely recite the principle in *dicta*. See *Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496, 529 (1982) (defense may be raised "for the first time on appeal"; dictum because the Court declined to address the issue; in any event, the State had not yet answered); *Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 683–84 n.18 (1982) (plurality) (defense "'sufficiently partakes of the nature of a jurisdictional bar' that it may be raised at any point of the proceedings"; dictum because the State raised the issue before the district court very early in the proceedings); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 99 n.8 (1984) (limitation "deprives federal courts of any jurisdiction to entertain such claims, and thus may be raised at any point in a proceeding"; dictum because the State had raised immunity in its first appeal and the court of appeals had decided it without reported objection of the plaintiffs, see 612 F.2d 84, 109 (3d Cir. 1979)); *Calderon* v. *Ashmus*, 523 U.S. 740, 745 n.2 (1998) (Eleventh Amendment "is jurisdictional in the sense that it is a limitation on the federal court's judicial power, and therefore can be raised at any stage of the proceedings"; dictum because immunity not at issue in case).

For the reasons given earlier, repudiating the perceived *Ford* rule that immunity may be raised at any stage of a proceeding would show no disrespect to the States, and repudiating that rule is necessarily to avoid conflicts with Article III.

Ford appears to be the product of an era in which State sovereign immunity was viewed as a matter of subject matter jurisdiction that had to be raised by a court *sua sponte* if not raised by a party. That notion never fit well with the long-established rule that sovereign immunity was a defense that

could be waived. In any event, that apparent basis of *Ford* has been undermined by *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 515–16 n.19 (1982), and by *Wisconsin Department of Corrections* v. *Schacht*, 524 U.S. at 389, where this Court made clear that immunity does not sufficiently resemble subject matter jurisdiction that a court must address it *sua sponte*. See also *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997) (the Eleventh Amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction.").[9]

The result in *Ford* may reflect the belief that States should have greater latitude in deciding when to assert sovereign immunity when the suit is based upon a State-created cause of action, as was the case in *Ford*. The federal interest is less strong in such cases. Indeed, federal-court jurisdiction in *Ford* was doubtful, because suits based upon State-created causes of action do not generally support federal-question jurisdiction under 28 U.S.C. § 1331, even when the plaintiff's claim for relief depends in part on resolution of a question of federal

[9] Dissenting in *Patsy* with respect to the ruling that immunity need not be addressed by the Court *sua sponte*, Justice Powell, joined by Chief Justice Burger, said: "The reason that the bar of the [Eleventh] Amendment may be raised at any time—as the Court previously has explained—is precisely because it *is* jurisdictional * * *." 457 U.S. at 519, 529 (1982). That view of the Amendment, however, did not carry the day in *Patsy* and has not thereafter.

law.[10] Professor Lapides's case, by contrast, is based in part upon 42 U.S.C. § 1983.

II. A State Should No More Be Entitled To Rest a Defense of Immunity on a Litigating Defendant State Entity's Lack of Authority Under State Law To Waive Immunity Than It Is To Rest That Defense on the State Attorney's Lack of Authority To Waive Immunity.

If the Court agrees that a State or State entity may not litigate on the merits and then rest an immunity defense on the State attorney's lack of authority under State law to waive immunity, it does not follow that the appropriate inquiry is whether the litigating State *entity* is authorized by State law to waive immunity.[11] Instead, the correct federal rule is that, if a

[10] The Court in *Ford* stated that the district court had had jurisdiction because of allegations of violations of the Commerce Clause and the Fourteenth Amendment, 323 U.S. at 460–61, and did not further comment on federal court jurisdiction, even though the federal issues had been dropped by the time the case reached this Court, see Respondents' Supplemental Memorandum in *Ford* at 3–4. Because the suit was held to be against the State, it does not appear that jurisdiction could have been based upon diversity of citizenship, because States are not citizens for purposes of diversity jurisdiction. Jurisdiction under 28 U.S.C. § 1331 would now be doubtful—or even more doubtful than it was at the time—under the teaching of *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804 (1986) (violation of a federal statute as an element of state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim under § 1331). The general federal policy is against federal court interference with state tax collection, see 28 U.S.C. § 1341. Accordingly, subject matter jurisdiction rules appear to be adequate to prevent undue federal-court interference with state tax collection, and sovereign immunity rules need not be deformed to achieve that end.

[11] While the authority of the Indiana Department of Treasury to waive immunity is not the focus of the *Ford* decision, *Ford* can be read as finding that the Department, as well as the State Attorney General, lacked authority under State law to waive immunity. *E.g.*, 323 U.S. at 469 ("It would seem,

defendant State entity litigates a federal case on the merits without invoking immunity, then the State entity may not later rest an immunity defense on its own lack of State-law authority to waive immunity, any more than it can rest an immunity defense on its *attorneys'* lack of State-law authority to waive immunity. This rule is similar to the rule of *Schlossberg* v. *Maryland Comptroller of the Treasury* (*In re Creative Goldsmiths of Washington, D.C., Inc.*), 119 F.3d 1140, 1148 (4th Cir. 1997), where the Fourth Circuit, addressing the consequences of a State entity filing a proof of claim in bankruptcy, said:

> "When a state authorizes its officials voluntarily to invoke federal process in a federal forum, the state thereby consents to the federal forum's rules of procedure and may not invoke sovereign immunity to protect itself against the interposition of defenses to its action. The scope of these available defenses and the state's concomitant waiver of immunity is a question of federal law and procedure * * *."

The Court should acknowledge that there is no significant difference between a State entity invoking federal court jurisdiction by intervening in a lawsuit or filing a proof of claim in a bankruptcy proceeding—circumstances in which the Court has not inquired into the authority of the State entity to waive immunity (see *Clark* v. *Barnard*, *Missouri* v. *Fiske*, and *New York* v. *Irving Trust*, and *Gardner*, discussed above)—and the same State entity defending a lawsuit on the merits without raising an immunity defense. As we explained in Part I, the State entity in each such case has voluntarily decided to submit

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therefore, that no properly authorized executive or administrative officer of the sate has waived the state's immunity to suit in the federal courts."). For a more recent case finding that a State executive department lacked authority to waive immunity, see *Magnolia Venture Capital Corp.* v. *Prudential Securities, Inc.*, 151 F.3d 439 (5th Cir. 1998).

the issues to decision on the merits by the federal court, as the Court appeared to recognize in *Richardson* v. *Fajardo Sugar Co.*, 241 U.S. 44 (1916) (discussed above). Absent recognition that waiver may appropriately be found in each such instance without regard to the State entity's State-law authority to waive immunity, federal courts will be subjected to entirely unnecessary proceedings and put in the position of issuing potentially advisory opinions in violation of the fundamental principles of Article III, as we have explained above.

All of the reasons that Justice Kennedy gave in his *Schacht* concurrence for reconsidering the Court's rules in this area and all of the reasons that we have discussed in Part I apply in full to the question of State-entity authority to waive immunity. It is unfair and an unreasonable imposition on federal courts to permit a State entity with a potentially available immunity defense to litigate on the merits without raising immunity, and then, dissatisfied with the way the litigation is going, claim that the entity was not authorized to waive immunity and thereby win dismissal on immunity grounds. Indeed, if the State entity is an "arm of the State" for sovereign immunity purposes, it is essentially because the State has chosen to act in the relevant field through the department, office, board, or other entity in question. And while a "sue and be sued" clause may not suffice, by itself, to waive sovereign immunity to suit in federal court, it surely signals to a potential plaintiff that the entity in question is an appropriate one to take to court. Once the litigation has begun, it shows no disrespect to the State to hold it to its voluntary choice to litigate on the merits.

A State is of course authorized to impose limitations and conditions upon its waivers of sovereign immunity. It may, for example, direct its own courts to apply the rule that only waivers by legislative action are effective, not waivers resulting from the conduct of a State entity (or its attorneys) in litigating the merits of a case. And it may direct its own courts to apply the rule that sovereign immunity may be raised at any time in

the course of litigation, in spite of the State entity's choosing to litigate on the merits without invoking immunity. But federal courts are entitled to apply a rule that, in appropriate circumstances, binds a State or State entity to its voluntary choice to litigate on the merits.

III. Whether the Court Affirms or Reverses the Judgment in this Case, It Should Not Undermine the Rule Suggested by Justice Kennedy's Concurrence in *Schacht* That Litigating on the Merits, Without Raising Immunity, Waives or Forfeits That Immunity.

Here, the State entity simultaneously (1) joined in removing the case to federal court, (2) answered the complaint with a defense, *inter alia*, of Eleventh Amendment or sovereign immunity, and (3) moved to dismiss on the ground of immunity, as well as on other grounds. Thus, while the State entity presented its immunity defense early in the proceeding, the proceeding ended up in federal court solely by virtue of the voluntary action of the State entity.

While we agree with Petitioner that the Regents' conduct amounts to "invoking federal jurisdiction" in such a way that immunity is waived, at least to the extent that their immunity might preclude suit in federal court, we do not elaborate on this argument, because it is addressed in full in the Petitioner's brief.

Whether the Court affirms or reverses the judgment in this case, however, it should do nothing to undermine the rule suggested by Justice Kennedy's concurrence in *Schacht*, that litigating in federal courts on the merits, without promptly asserting a potentially available defense of immunity, waives or forfeits that immunity. That is, as Justice Kennedy suggested, a court should "infer[] waiver from the failure to raise the [Eleventh Amendment] objection at the outset of the proceedings * * *." 524 U.S. at 395. Indeed, this rule is just

another way of applying Justice Kennedy's other suggested rule, that a State entity waives immunity when, "under no compulsion," it "voluntarily invokes [federal court] jurisdiction," such as by removing a case to federal court (as here), intervening, or filing a claim. *Id.* As we have explained above, defending on the merits, instead of moving to dismiss on the grounds of immunity, as occurred in *Richardson* v. *Fajardo Sugar Co.*, invokes federal court jurisdiction in a manner fundamentally identical to intervening on the merits or filing a claim in an ongoing federal court proceeding, as occurred in *Clark* v. *Barnard*, *New York* v. *Irving Trust*, and *Gardner*, discussed above. In each case, the State entity has made a choice to litigate on the merits rather than to stand on its immunity from suit.[12]

Several courts of appeals have articulated rules such as Justice Kennedy's or moved in the direction of such a rule. *E.g.*, *Hill* v. *Blind Industries & Services of Maryland*, 179 F.3d 754 (9th Cir. 1999), *amended*, 201 F.3d 1186 (9th Cir. 2000) (ruling that a State entity could not raise immunity for the first time on the eve of trial); *SDDS, Inc.* v. *South Dakota* (*In re SDDS, Inc.*), 225 F.3d 970, 973 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 1733 (2001) (a State may waive immunity "'through its conduct. Courts have inferred a waiver when the State has made a general appearance in federal court and defended a lawsuit on the merits'") (quoting *Hankins* v. *Finnel*, 964 F.2d 853, 856 (8th Cir. 1992)); *Lawson* v. *Shelby County, Tenn.*, 211 F.3d 331, 334 (6th Cir. 2000) ("Consent may also take the form of a voluntary appearance and defense on the merits in federal court.") (dicta); *Neinast* v. *Texas*, 217 F.3d 275, 279 (5th Cir.

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[12] A different result would obtain when a State entity promptly moves to dismiss on immunity grounds and the district court denies both the motion to dismiss and a stay of proceedings pending the State entity's interlocutory appeal. If such a State entity proceeds to litigate on the merits while its interlocutory appeal is pending, it cannot be said that it is doing so voluntarily.

2000), *cert. denied*, 531 U.S. 1190 (2001) ("the sta
simultaneously proceed past the motion and answer st
merits and hold back an immunity defense") (citing *H*
v. *United States Department of Education* (*In re R*
F.3d 926, 930 n.7 (8th Cir.1999) (citing *Hill* with app
proposition that State entity's active participation in ba
dischargeability proceedings, combined with belated
of immunity, were factors relevant to waiver); *De*
Monteith, 255 F.3d 986, 989 (9th Cir. 2001) (
Amendment "must be raised 'early in the proce
provide 'fair warning' to the plaintiff.") (quoting *Hil*

As we have explained in the preceding parts of this
believe that such a rule shows due respect to th
prevents purely strategic exploitation of federal court
in a manner that is inconsistent with Article III, and
the parties. Such a rule is consistent with the requi
explicit waiver found in *Atascadero State Hospital* v.
473 U.S. 234 (1985), because that requirement was cra
congressional and State statutes in mind and did not
question longstanding prior case law that invoking fed
jurisdiction does waive immunity. It is also consisten
demise of the constructive waiver theory of *Parden* v.
Railway of the Alabama State Docks Department, 377
(1964), see *College Savings Bank* v. *Florida*
Postsecondary Education Expense Board, 527 U.S. 66
because defending a case on the merits, withou
immunity, directly and unmistakably invokes the juris
the federal court, and because thereafter raising im

---

[13] We do not represent that the results below are uniform in
See, *e.g.*, *Schlossberg* v. *Maryland Comptroller of the Trea*
Creative Goldsmiths of Wash., D.C., Inc.), 119 F.3d 1140 (4th
(defense on the merits of adversary proceeding in bankruptcy
where State Attorney General was not authorized by State la
immunity and where the lawsuit was unrelated to the State entity
claim in the bankruptcy proceeding, did not waive immunity).

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avoid unsatisfactory results enlists the aid of the federal courts in an effort to negate the judicial proceedings that have gone before in a way that is fundamentally different from mere participation in a commercial activity that is subject to federal regulation. As this Court stated in *Smith* v. *Reeves*, 178 U.S. 436, 440 (1900), "When a State submits itself without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done * * *."

Justice Kennedy's proposed rule should assist the Court in analyzing and deciding this case. If Justice Kennedy's proposed rule requires overruling that part of *Ford* which underlies the perceived rule that an immunity defense may be raised at any stage of a proceeding, that step should be taken. As we have explained above, the notion that sovereign immunity could be raised at any time was premised on such immunity being essentially similar to lack of subject matter jurisdiction. That notion never fit well with the long-accepted rule that sovereign immunity was a defense that the State could "waive at pleasure." *Clark* v. *Barnard*, 108 U.S. at 447. It has been further undermined by the ruling in *Patsy* and *Schacht* that the issue need not be raised by a court *sua sponte*.

There is no occasion in this case to attempt to define at what point litigation becomes "litigation on the merits" so as to waive immunity or at what point a belated assertion of immunity might be justified under circumstances similar to those that at time justify other belatedly-asserted defenses—except to the extent necessary to decide this case. But this case is an appropriate occasion to make clear that sovereign immunity more closely resembles personal jurisdiction than subject-matter jurisdiction and that, accordingly, a State entity lacks the absolute right to dismissal on the basis of immunity if it has litigated on the merits without raising the defense. Justice Kennedy suggested in his concurrence in *Schacht* that the Court could "eliminate the unfairness by modifying our

Eleventh Amendment jurisprudence to make it more consistent with our practice regarding personal jurisdiction." 524 U.S. at 395. Although the requirement of personal jurisdiction serves constitutional interests as fundamental as the Eleventh Amendment, lack of personal jurisdiction is a threshold defense that must to be raised at the outset of the litigation or forfeited. Fed. R. Civ. P. 12(h)(1). Whether or not that precise rule is suitable to Eleventh Amendment immunity, federal courts can and should treat immunity as a defense sufficiently similar to personal jurisdiction that it must be asserted before the State entity actively litigates on the merits.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Eleventh Circuit and remand for further proceedings in accordance with the Court's decision.

Respectfully submitted,

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In the Supreme Court of the United States

PAUL D. LAPIDES,
Petitioner,
v.
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE STATES OF TEXAS, ALABAMA, ALASKA, COLORADO, DELAWARE, FLORIDA, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, NEBRASKA, NEVADA, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

When a State is sued in state court and removes the case to federal court, does the State expressly and unequivocally waive its Eleventh Amendment immunity by virtue of the defensive, procedural act of removal?

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INTEREST OF *AMICI*

State *Amici* appear in support of Respondent, *see* SUP. CT. R. 37.4, urging the Court to affirm the judgment of the Eleventh Circuit and hold that a State sued in state court on both state and federal claims does not waive its Eleventh Amendment immunity when an assistant attorney general removes the case to federal court. State *Amici* have an interest in this case because it directly implicates their constitutional immunity from suit, which inheres in the States' sovereign status and is exemplified by the Eleventh Amendment rights at stake in this appeal.

SUMMARY OF ARGUMENT

An assistant attorney general's removal of a case to federal court does not signal a State's consent to suit. Removal, pursuant to 28 U.S.C. §1441, is a procedural option available to any defendant sued in state court on federal claims. A state defendant is not transformed into a plaintiff once the suit arrives in federal court. Rather, the suit remains one "commenced or prosecuted against one of the United States," which falls squarely within the prohibition of the Eleventh Amendment. U.S. CONST. amend. XI.

To infer a waiver of Eleventh Amendment immunity from removal would strip state legislatures of their power to determine the circumstances under which States may be sued. The legislative branch is uniquely equipped to evaluate the fiscal, policy-driven, and practical compromises that inform a State's consent to suit. The federal judiciary should not divest state legislatures of the right to engage in this deliberative, political process by imbuing relatively politically unaccountable, assistant attorneys general with a power to consent to suit not conferred by state law. *See Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459 (1945).

Nor should the Court embrace the notion that the Eleventh Amendment affords a mere "forum immunity" readily severable from the States' constitutional immunity from suit. The States' inviolable sovereignty is not comprised of defeasible components subject to erosion on a case-by-case basis. Moreover, so-called "forum immunity" was a matter of grave importance to the Framers and the people whose legislatures ratified the Eleventh Amendment, and it should not lightly be cast aside.

Moreover, a waiver-by-removal rule would impose practical costs beyond the States' Eleventh Amendment immunity—particularly when a State, like Georgia in this case, is sued along with individual codefendants. These individuals may desire federal adjudication of their qualified-immunity defense—the

denial of which can be appealed as a matter of right in federal court, but not always in state courts. States would be compelled to thwart their employees' removal, however, to avoid sacrificing their own Eleventh Amendment immunity. And that is a Hobson's Choice States should not have to make, and a penalty sued state employees should not have to suffer.

A waiver-by-removal rule is an affront to the States' sovereign status that cannot be squared with federalism principles and longstanding Eleventh Amendment jurisprudence. The Eleventh Circuit correctly refused to equate removal with consent to suit, and its judgment should be affirmed.

ARGUMENT

I. THE COURT SHOULD NOT INVADE THE STATES' INVIOLABLE SOVEREIGNTY BY IMPLYING A WAIVER OF ELEVENTH AMENDMENT IMMUNITY WHEN A STATE DEFENDANT REMOVES A CASE TO FEDERAL COURT.

The States are sovereigns in their own right, imbued with a constitutional immunity that prohibits suits by individuals absent the States' express and unequivocal consent. *See, e.g., Alden v. Maine*, 527 U.S. 706, 712-13 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681-82 (1999). The States' immunity is "one of the attributes" that is "inherent in the nature of sovereignty," reflecting "the general sense and the general practice of mankind." THE FEDERALIST No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also Alden*, 527 U.S., at 714 ("The federal system established by our Constitution preserves the sovereign status of the States . . . . together with the dignity and essential attributes inhering in that status.").

Just as an unconsenting State cannot be sued in its own courts, nor can it be sued in federal court. U.S. CONST. amend. XI; *Alden*,

527 U.S., at 730-31. In both scenarios, immunity flows from the same source: a State's sovereign status. 527 U.S., at 728-31.

Notwithstanding the States' "inviolable sovereignty," *id.*, at 714 (quoting THE FEDERALIST NO. 39, at 245 (James Madison)), Lapides claims that his suit against Georgia can proceed in federal court over Georgia's objection.[1] Lapides does not purport to rely on any congressional waiver of sovereign immunity pursuant to §5 of the Fourteenth Amendment—an enforcement provision this Court recognizes as a permissible vehicle for abrogating the States' sovereign immunity. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996) (discussing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)). Nor does Lapides identify any Georgia statute that expressly and unequivocally consents to a suit, like his, in federal court. *See Alden*, 527 U.S., at 755 (noting States' ability to consent by statute). Instead, Lapides argues that his suit may proceed because an assistant attorney general removed it to federal court pursuant to 28 U.S.C. §1441. This theory of waiver cannot be squared with the plain text of the Eleventh Amendment or this Court's sovereign-immunity jurisprudence.

A. Under the Plain Text of the Eleventh Amendment, a Removed Suit Against a State Cannot Proceed in Federal Court.

Pursuant to the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State." U.S. CONST. amend. XI. Although the amendment speaks solely in terms of suits in law or equity brought

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1. The Georgia defendants moved to dismiss Lapides's suit under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), asserting, *inter alia*, Eleventh Amendment immunity from suit. *See* J.A. 48-50.

by citizens of other or foreign States, the Court has not limited the Eleventh Amendment's jurisdictional strictures to its text. *See Alden*, 527 U.S., at 727.

Instead, the amendment has been construed as exemplifying a larger constitutional immunity enjoyed by the sovereign States. *Id.*, at 728; *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267-68 (1997). Thus, nonconsenting States are immune from federal suits brought by a State's own citizens, *Hans v. Louisiana*, 134 U.S. 1 (1890), as well from admiralty suits, which are not suits "in law or equity" included within the amendment's literal terms. *Ex parte New York*, 256 U.S. 490 (1921).

The critical aspect of the Eleventh Amendment, therefore, is its broad prohibition of any suit "commenced or prosecuted" by an individual against one of the States. U.S. CONST. amend. XI; *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *Alden*, 527 U.S., at 727-29. Since a removed suit against a State falls into this category, it is a suit barred by the Eleventh Amendment.

A State defendant's removal does not alter the fundamental nature of the suit or realign the parties. If the suit demands judgment on claims asserted against a State, it is a suit "commenced or prosecuted against one of the United States" within the meaning of the Eleventh Amendment. *See Missouri v. Fiske*, 290 U.S. 18, 26 (1933) ("To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit, is, according to the common acceptance of language, to continue that demand.").

Although a removed suit is not "commenced" in federal court, it nonetheless remains a suit "prosecuted against one of the United States," U.S. CONST. amend. XI, due to the plaintiff's continued demand for judgment. *Fiske*, 290 U.S., at 26-27. Either action is enough to offend the Constitution and the States' sovereignty. U.S.

CONST. amend. XI (conferring immunity from federal-court suits "commenced *or* prosecuted against one of the States") (emphasis added). As such, the plain terms of the Eleventh Amendment apply—irrespective of removal—and an individual suit cannot proceed against an unconsenting State in federal court. *See id.*

B. The Removal Statute Applies to Any Defendant Sued in State Court on Federal Claims, and a State Defendant's Availment of This Procedure Cannot Be Equated with Express and Unequivocal Consent to Suit.

1. The States cannot be sued without their express and unequivocal consent.

To waive sovereign immunity, including Eleventh Amendment immunity, a State must expressly and unequivocally consent to suit. *See, e.g., College Sav.*, 527 U.S., at 681-82; *Pennhurst State Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). This is because the States' immunity is of constitutional dimension, and "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-40 & n.1 (1985) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). For purposes of the Eleventh Amendment, "[t]he test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Id.*, at 241.

Typically, the Court deems a State to have consented to suit in federal court when a state statute expressly and unequivocally reflects that consent. *Id.*, at 238 n.1; *see also Alden*, 527 U.S., at 755. Consent to suit in state court will not suffice, because "[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst*, 465 U.S., at 99-100 & n.9.

States also are deemed to consent to suits "pursuant to the plan of the Convention or subsequent constitutional Amendments"—such as a suit brought against a State by the United States. *Alden*, 527 U.S., at 755; *Coeur d'Alene*, 521 U.S., at 267. Similarly, the States, in adopting the Fourteenth Amendment, consented to suits authorized by Congress through appropriate legislation under its §5 enforcement powers. *Alden*, 527 U.S., at 756.

Under no circumstances, however, may a waiver of sovereign immunity be constructively implied through a State's litigation or other conduct. *See College Sav.*, 527 U.S., at 681-82; *Atascadero*, 473 U.S., at 238-40 & n.1; *cf. infra* Part I.B.3. Because an unequivocal and express waiver of immunity is required to waive a State's sovereign immunity, waiver cannot be inferred from a State's mere exercise of the statutory right of removal available to any defendant. *See infra* Parts I.B.2, .B.3.

2. The removal statute does not, and could not, waive the States' Eleventh Amendment immunity.

Removal is a statutorily created, procedural benefit available to any defendant sued in state court on federal claims:

> "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. §1441.

Nothing in the removal statute indicates that exercising this procedural option comes at a price if the defendant happens to be a State. *See id.*; *see also* U.S. Br., at 19. Certainly, there is no expression of congressional intent to waive State defendants' Eleventh Amendment immunity upon removal. *See Garrett*, 531 U.S., at 363 (noting the requirement that Congress expressly indicate its unequivocal intent to waive the States' immunity under the Eleventh Amendment).

Nor, as discussed in Respondent Georgia's brief, does anything in the legislative history of §1441 suggest congressional intent to withhold the option of removal from sued States or condition its availability on forfeiture of States' Eleventh Amendment immunity. *See* Resp't Merits Br. Part A.4. Rather, the removal statute was enacted to provide all defendants the benefit of federal expertise on federal questions of law. *See id.*

As a general procedural statute, moreover, 28 U.S.C. §1441 could not waive sovereign immunity because such an act would not fall within Congress's constitutional authority. Congress's only valid basis for abrogating the States' immunity is its enforcement power under §5 of the Fourteenth Amendment. *See, e.g., Garrett*, 531 U.S., at 364. This grants Congress authority to enforce the substantive guarantees of §1 of the Fourteenth Amendment, including due process and equal protection. *Id.*, at 365. But, under §5, Congress is limited to enacting legislation that exhibits "congruence and proportionality" between the constitutional injury to be prevented and the means employed. *Id.* When Congress exercises §5 powers, therefore, there must be a constitutional right at stake *and* Congress must identify a history and pattern of the States violating that constitutional right. *Id.*, at 365, 368.

No constitutional right—much less a pattern of unconstitutional State activity—is implicated by Congress's enactment of 28 U.S.C. §1441. That statute merely provides any defendant in "any civil action brought in a State court of which the district courts of the United States have original jurisdiction" the opportunity to remove a case to federal court. 28 U.S.C. §1441. By no means can §1441 be characterized as remedial legislation in response to a pattern of constitutional abuses on the part of the States. It is simply a procedural vehicle authorizing removal of state-court suits that include federal claims. *See* Resp't Merits Br. Part A.4. As such, §1441 could never meet the stringent criteria for a congressional waiver of Eleventh Amendment immunity. *See Garrett*, 531 U.S.,

at 363-65 (reaffirming that Congress can only waive the States' immunity "when it both unequivocally intends to do so and 'acts pursuant to a valid grant of constitutional authority'"—*i.e.*, "only to the extent the statute is appropriate §5 legislation") (quoting, in part, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000)).

The Court should not judicially imply a waiver into §1441 to achieve a result Congress itself could not statutorily effect. *See Alden*, 527 U.S., at 751 ("It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place.") (quoting *Louisiana ex rel. Elliott v. Jumel*, 107 U.S. 711, 727-28 (1883)); *Am. Fed'n of State, County & Mun. Employees*, 949 F.Supp. 438, 442 (W.D. Va. 1996) (rejecting plaintiff's argument for an implied waiver of Eleventh Amendment immunity because "it would be doing indirectly that which Congress could not do directly"), *aff'd sub nom. Abril v. Virginia*, 145 F.3d 182 (CA4 1998); *cf.* Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 524 (2001) ("Certainly, it has never been thought that the judiciary can consent for the sovereign in the particular case.").

Moreover, it would be antithetical to the "attributes of sovereignty," FEDERALIST NO. 81, at 487, and this Court's longstanding Eleventh Amendment jurisprudence, to afford States *fewer* procedural rights under §1441 than other defendants. It is elemental that the States' defensive rights exceed those of ordinary litigants due to the States' sovereign status. *See, e.g., Hans*, 124 U.S., at 12-16. Because sovereignty erects additional barriers to suits against the State, it is implausible that a State defendant should be deprived of procedural advantages available to any other defendant sued in state court on federal claims. *See* 28 U.S.C. §1441.

3. A State's defensive litigation conduct, such as removal, does not equate with express and unequivocal consent to suit.

Apart from the types of consent previously discussed, *see supra* Part I.B.1, the Court has held that a State that brings its own claim to federal court consents to federal court jurisdiction. Thus, "[i]f the state chooses to come into the court as plaintiff, or to intervene, seeking the enforcement of liens or claims, the state may be permitted to do so, and in that event its rights will receive the same consideration as those of other parties in interest." *Fiske*, 290 U.S., at 28; *see also, e.g., Gardner v. New Jersey*, 329 U.S. 565, 574 (1947) (holding that New Jersey waived Eleventh Amendment immunity by filing a proof of claim in federal bankruptcy court); *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883) (holding that Rhode Island's voluntary intervention to prosecute a claim to a controverted fund constituted consent to suit).

The mere act of removal, however, is not comparable to initiation of a federal suit for the purpose of enforcing a state entitlement or prosecuting a state claim. *Cf. Gardner*, 329 U.S., at 574; *Clark*, 108 U.S., at 447-48. Rather, removal is a defensive procedural act. *See supra* Part I.B.2.

Indeed, this Court expressly contemplated, in *Wisconsin Department of Corrections v. Schacht*, that a state defendant could assert Eleventh Amendment immunity following removal of a case to federal court. 524 U.S. 381, 392 (1998) ("A State's proper assertion of an Eleventh Amendment bar *after* removal means that the federal court cannot hear the barred claim.") (emphasis added). The issue in *Schacht* was the effect of Eleventh-Amendment-barred claims on removal jurisdiction, not waiver of a State's Eleventh Amendment immunity. *Id.*, at 386. But, in deciding that question, the Court distinguished the mere presence of constitutionally barred claims—which do not defeat removal jurisdiction—from "[t]he State's *later invocation* of the Eleventh Amendment," which

"place[s] the particular claim beyond the power of the federal courts to decide." *Id.*, at 391 (emphasis added). Thus, *Schacht* indicates that the Eleventh Amendment presents a jurisdictional hurdle even in suits removed by a state defendant to federal court. *See id.*

Lapides and the United States distort the "voluntary" nature of a state defendant's removal of a case—automatically equating this *defensive* act with consent to suit in federal court. This Court, however, has never held that *every* "voluntary" entry into federal court waives a State's Eleventh Amendment immunity.

For example, in *Missouri v. Fiske*, the State voluntarily intervened in a federal action to prevent distribution of stocks subject to pending inheritance-tax proceedings before a state probate court. 290 U.S., at 19. Parties in the federal action then filed an "ancillary and supplemental bill of complaint" to enjoin Missouri from interfering with the stock. *Id.*, at 24. The Court held that this ancillary pleading was a suit against the State barred by the Eleventh Amendment, and that the State did not consent to federal jurisdiction through its voluntary intervention in the case. *Id.*, at 25-27. The State intervened solely for the limited purpose of protecting its interest in inheritance taxes to be determined by the state probate court, and not for the purpose of litigating the rights at stake in the federal suit. *Id.*, at 19, 27. And since Missouri could not be sued in federal court on an original bill without its consent, neither could it be sued on an ancillary bill filed after its intervention. *Id.*, at 28.

Just as Missouri's limited, voluntary intervention in a federal suit could not create a basis for federal jurisdiction that did not originally exist, *see id.*, nor can a State's mere removal of a case to federal court erase the jurisdictional strictures of the Eleventh Amendment. By removing a case, the State does not "come into the court as plaintiff" or "intervene, seeking the enforcement of liens or claims." *Id.*, at 28. The State simply defends a lawsuit, exercising the procedural option of removal available to *any*

defendant sued in state court on federal claims. This purely defensive act in no manner signals consent to be sued in federal court. *See Frances v. Wright*, 19 F.3d 337, 343 (CA7 1994) ("[T]he mere fact that Defendants removed the case to federal court" is not "the kind of explicit waiver of federal sovereign immunity required by the [Supreme] Court"), *abrogated on other grounds by Schacht*, 524 U.S., at 385-86. Rather, removal can reflect a variety of other practical and policy-driven concerns, as detailed *infra* Part III.

The Court should not infer a State's consent to suit in federal court based solely on *defensive* litigation conduct. Lapides and the United States urge the Court to equate removal with affirmative consent to federal-court jurisdiction, but they do not contend that removal literally transforms a sued State from a defendant into a plaintiff or an intervenor seeking enforcement of liens or claims. And these are the predominant circumstances in which the Court has construed a State's litigation conduct as consent to suit. *See, e.g., Gardner*, 329 U.S., at 574; *Clark*, 108 U.S., at 448.[2]

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2. Two "defensive" waiver cases discussed most extensively by Lapides' *amici* are distinguishable on their facts. In *Gunter v. Atlantic Coast Line R.R.*, 200 U.S. 273 (1906), the Court held that South Carolina was not immune from an ancillary suit filed under the same cause number as a previous suit to enjoin tax collection, in which the attorney general never asserted Eleventh Amendment immunity, defended on the merits, and appealed to this Court, which affirmed judgment for the plaintiffs. The *Gunter* holding, however, was premised on more than defensive conduct: an express statutory mandate required the attorney general to represent the State in such tax suits, *id.*, at 286-88; the doctrine of *res judicata* bound the State to the original judgment, *id.*, at 290-91; and the State voluntarily obeyed the original judgment for twenty-five years before pursuing the collections at issue in *Gunter*. *Id.*, at 289. Thus, under the confluence of these factors, South Carolina consented to suit. *Id.*, at 292; *see also Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 56-57 (1944) (describing *Gunter*'s tri-part reasoning).

The concept of waiver-by-removal advanced by Lapides and the United States does not rest on a State's express and unequivocal consent to federal-court jurisdiction, as is required to waive Eleventh Amendment immunity. *See supra* Part I.B.1. The Court's

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Similarly, the Court's waiver holding in *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44 (1916), implicated more than a single defensive act comparable to removal. In that case, a Puerto Rico statute authorized a party protesting taxes to sue the treasurer "in the court having competent jurisdiction thereto." *Id.*, at 47 (quoting No. 35, Laws of Porto Rico, 1911 § 3). Eight months after the initiation of such a suit, with trial set and multiple answers on file, the attorney general moved to dismiss on Eleventh Amendment grounds. The Court held that "having solemnly appeared and taken the other steps above narrated," Puerto Rico could not now contest jurisdiction. *Id.*

Although the Court recognized the defendant, Puerto Rico, as a sovereign required to consent to suit, *id.*, the opinion contains no mention of the Eleventh Amendment. *Cf. Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 141 n.1 (1993) (noting the First Circuit's holding that Puerto Rico is "treated as a State for purposes of the Eleventh Amendment" but expressing "no view on this matter"). Thus, it is unclear whether, in 1916, the Court contemplated that *Richardson*'s waiver analysis would apply equally to the States, given their express constitutional immunity from federal-court suits. Moreover, *Richardson* analyzed litigation conduct far more extensive than removal—although State *Amici* submit that even Puerto Rico's attorney general's actions did not "consent" to suit. In that respect, State *Amici* agree with the United States, *see* U.S. Br., at 25-26, that it is difficult to reconcile *Richardson* with *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 467 (1945) (holding that an attorney general unauthorized by state law to waive immunity cannot consent to suit; thus, the State can invoke the Eleventh Amendment for the first time on appeal to this Court). To the extent *Richardson* inferred waiver from an attorney general's defensive conduct, the Court should reaffirm that *Ford Motor Co.*, not *Richardson*, correctly states the law. *See infra* Part I.D.

Eleventh Amendment jurisprudence dispels any notion that a State can implicitly waive sovereign immunity through defensive litigation conduct.

Because a waiver-by-removal rule does not comport with traditional sovereign-immunity analysis, Lapides and the United States may be best understood as advocating a unique procedural penalty for sovereign States who exercise the option of removal available to any other defendant as a matter of right. The problem is, no constitutional basis for such a penalty exists. *See supra* Part I.B.2. Fundamental notions of federalism, and fair play, preclude conditioning State defendants' removal on forfeiture of their Eleventh Amendment immunity.

4. The United States's inability to waive sovereign immunity through litigation conduct militates against imposing a waiver-by-removal rule on the sovereign States.

The United States erroneously suggests that, although its own sovereign immunity cannot be waived through litigation conduct, the States enjoy no comparable right. U.S. Br., at 18-19 & n.6. The Court should reject this argument, as it is inconsistent with the established scope of the States' constitutional immunity and the Court's Eleventh Amendment jurisprudence.

Arguing that the Constitution grants exclusive control over the United States's money and property to Congress, whereas the Eleventh Amendment makes no comparable assignment to the legislatures of the States, the United States mistakenly concludes that an executive state official, like an attorney general, can waive the States' immunity in the absence of legislative consent. *See id.* This reasoning is unpersuasive on several levels.

First, it is well-established that the States' constitutional immunity is not limited to the text of the Eleventh Amendment, but encompasses more expansive attributes of sovereignty inherent in

the original constitutional design. *Alden*, 527 U.S., at 728-29. Second, the Court has acknowledged the "general rule" that a state legislature's specific enactment is required to waive immunity, *id.*, at 757-58, recognizing the need for waivers to be effected only after "deliberation by the political process established by the citizens of the State." *Id.*, at 751; *see also infra* Part I.C.

Finally, the Court has previously declined to afford the States fewer sovereign rights, with respect to immunity from individual suits, than those afforded the United States. Indeed, on several occasions the Court has analogized the States' sovereign immunity to that of the federal government and found no basis to distinguish the two. *See, e.g., Alden*, 527 U.S., at 749-50 ("It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts. In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege."); *College Sav.*, 527 U.S., at 682 ("[I]n the context of *federal* sovereign immunity—obviously the closest analogy to the present case—it is well established that waivers are not implied. We see no reason why the rule should be different with respect to state sovereign immunity.") (citation omitted).

Just as "[i]t has long been settled that officers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court in the absence of some express provision by Congress," *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947), the Court should similarly hold that state officers, like attorneys general, cannot unilaterally consent to suit on behalf of the States.

The act of removal should be no exception to this rule. The Court has already determined that the United States does not waive its immunity by removing a case: "The fact that [a] removal was effected on petition of the United States and the stipulation of its attorney . . . are facts without legal significance. Where jurisdiction

has not been conferred by Congress, no officer of the United States has power to give to any court jurisdiction of a suit against the United States." *Minnesota v. United States*, 305 U.S. 382, 388-89 (1939). Similarly, where consent to federal jurisdiction has not been conferred by a State's legislature, no officer of the State has power to give a federal court jurisdiction over the State. *Cf. id.*

C. State Legislatures Are Uniquely Equipped to Decide Whether and Where to Consent to Suit.

Apart from the limited circumstances under which Congress may abrogate the States' sovereign immunity pursuant to §5 of the Fourteenth Amendment, *see Garrett*, 531 U.S., at 365, 368, the decision to consent to suit traditionally rests with the legislatures of the States. *See, e.g., Alden*, 527 U.S., at 757-58 (noting Maine's adherence to "the general rule" that a State sheds its sovereign immunity only through an enactment of the state legislature); Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV., at 489 (observing that on the state level, like the federal level, "exclusive competence" to consent to suit "is vested in the legislative branch").

This general rule appropriately reflects the role of state legislatures in the political process, in which they are charged with balancing competing policy interests and promoting the public good. As the Court observed in *Hans*, "[t]he legislative department of a state represents its polity and its will, and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations." 134 U.S., at 21. Not surprisingly, therefore, States often confirm their legislature's exclusive authority to waive sovereign immunity in statutes, *see, e.g.*, 1 PA. CONS. STAT. §2310, constitutional provisions, *see, e.g.*, TENN. CONST. art. I, §17, and judicial precedent, *see, e.g., Baker v. Ives*, 294 A.2d 290, 298 (Conn. 1972).

State legislatures are best equipped to determine the circumstances under which a State should consent to suit, since suits may drain the State of scarce monetary resources and threaten "other important needs and worthwhile ends [that] compete for access to the public fisc." *Alden*, 527, U.S., at 751. "[A]llocation of scarce resources among competing needs and interests lies at the heart of the political process." *Id.* Thus, "[i]f the principle of representative government is to be reserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State." *Id.*

Permitting a state legislature to evaluate its citizens needs and allocate scarce resources protects the States' sovereign interests by centralizing their efforts to direct "the course of their public policy and the administration of their public affairs." *Id.*, at 750. Moreover, when this power is vested in the politically responsive legislative branch, citizens have the opportunity to voice their concerns and policy preferences through their elected representatives, whose actions are measured by "the political accountability so essential to our liberty and republican form of government." *Id.*, at 751. This ensures "the States' ability to govern in accordance with the will of their citizens." *Id.*, at 750-51; *see also* J. Brian King, Note, *The State Political Processes Theory of the 11th Amendment*, 19 REV. LITIG. 335, 356 (2000) ("When a state has not waived its immunity, it is because its citizens have willed it that way.").

Because waivers of immunity can cause citizens to suffer increased taxes or fees to pay for the costs of litigation and potential judgments against the State, those citizens should be afforded an opportunity to vote for representatives who will waive immunity only when, on balance, it advances the public good—*i.e.*, "when the benefits of such a waiver would outweigh the costs." King, *The*

State Political Processes Theory of the 11th Amendment, 19 REV. LITIG., at 360.

Accordingly, a State should not be deemed to consent to suit unless its legislature has determined that such consent promotes the State's interests and reflects its citizens' will. Implying consent to suit from other sources—such as an assistant attorney general's litigation conduct—would impermissibly "deprive the legislature of the power of judging what the honor and safety of the state may require," which is an offense to sovereignty "attended with greater evils than such failure can cause." *Hans*, 134 U.S., at 21.

Of course, a state legislature could choose to grant its attorney general, and his or her assistants, the power to waive sovereign immunity and consent to suit on behalf of the State. But that is a choice to be made by each state legislature, not a federal court. *Ford Motor Co.*, 323 U.S., at 467; *see infra* Part I.D.

Indeed, several States' legislatures have directly contemplated, and addressed by statute, the sovereign-immunity implications of an attorney general's litigation conduct. Typically, these statutes disclaim the attorney general's authority to waive the State's immunity from suit through certain acts. For example, the Texas legislature has decreed that "[a]n admission, agreement, or waiver made by the attorney general in an action or suit to which the state is a party does not prejudice the rights of the state." TEX. GOV'T CODE §402.004. And while the Wyoming legislature permits the "attorney general, his deputies or his assistants" to represent the State "in any courts of the state or the United States," WYO. STAT. §9-1-608(a),"[a]n appearance by the attorney general or his staff does not waive the sovereign immunity of the state." *Id.*; *see also* OKLA. STAT. tit. 74, §18g ("The appearance of the Attorney General in any matter, proceeding or action in any court, before any commission, board or officer, shall not be construed to waive the immunity of the State of Oklahoma from being sued.").

By contrast, the Alaska legislature, prior to January 1, 1999, expressly permitted its attorney general to waive the State's Eleventh Amendment immunity in select circumstances, such as suits involving Alaska's title to submerged lands. ALASKA STAT. §44.23.020(c). After January 1, 1999, however, that permission expired—except with respect to the attorney general's waivers in ongoing cases. *Id.*

Florida's legislature also waived sovereign immunity regarding certain litigation actions: When Florida sues to recover damages in tort, the State waives its immunity from tort counterclaims resulting from the same transaction or occurrence. FLA. STAT. §768.14.

Respecting the state legislatures' ability to make these choices is critical to preserve the States' sovereign status. A State's authority to "order the processes of its own governance" inheres in the nature of sovereignty and should not casually be displaced. *Alden*, 527 U.S., at 751-52. If the Court were to imply waiver from the defensive litigation conduct of a State's attorney general in circumstances in which the State's legislature has not authorized a waiver, it would cause a violation of *state* separation-of-powers principles by vesting a state executive officer with powers exclusively assigned to the legislative branch. *See Gwinn Area Cmty. Sch. v. Michigan*, 741 F.2d 840, 847 (CA6 1984) (holding that in the absence of express statutory consent to suit in federal court "the actions of attorneys representing the state defendants in this case in joining the removal petition cannot be treated as supplying a consent which the legislature withheld"); *cf. Alden*, 527 U.S., at 751 (counseling against federal assertions of authority that blur the "branches of the state governments, displacing state decisions that go to the heart of representative government") (internal quotation marks and citation omitted). Such an unwarranted intrusion into the political process of the States would offend federalism and sovereign-immunity principles. *Cf. Alden*, 527 U.S., at 751-52.

D. The Court Should Reaffirm *Ford Motor Co.*

In *Ford Motor Co. v. Department of Treasury*, the Court analyzed whether Indiana's attorney general could waive the State's Eleventh Amendment immunity by failing to assert it until the case reached the Supreme Court. 323 U.S., at 466-67. Consistent with the notion that only state legislatures can waive sovereign immunity, *see supra* Part I.C., the Court determined that Indiana's executive officers' ability to consent to suit turned on "their power under state law to do so." *Id.*, at 467. The Court noted that Indiana's legislature may waive immunity only by general law, and statutes authorizing the attorney general to defend suits against the State did not empower him to waive immunity. *Id.*, at 468-69. Consequently, consent to suit in federal court could not be inferred from the attorney general's defensive litigation conduct. *Id.*

Despite *Ford*'s reflection of well-established and enduring sovereign-immunity principles—including a State's right to define the scope of its consent to suit as a matter of state law—Petitioner Lapides and his *amici*, including the United States, urge the Court to overrule or limit *Ford* and permit implied waivers of sovereign immunity from an assistant attorney general's defensive litigation conduct, including removal of a case to federal court. *See* Pet'r Br. at 35-36, 39-40; U.S. Br., at 25-26; Ceres Marine Terminal Br., at 9-15. The Court should decline the invitation to depart from precedent and launch this dramatic assault on States' rights.

As previously discussed, *supra* Part I.C, the power to waive immunity properly resides in the legislatures of the States—bodies uniquely equipped to balance competing claims to the public fisc and define the circumstances under which a waiver of sovereign immunity would both reflect the citizens' will and create a net gain for the public good. Indeed, under our republican form of government, it is the state legislatures' duty to make law in furtherance of the public good.

State attorneys general, by contrast, do not make law. They discharge their duties as defined by state law—typically through powers conferred by state legislatures. *See generally* Resp't Merits Br., App. 18a-85a (collecting statutory and constitutional provisions detailing duties of the States' attorneys general, who primarily defend the States in individual suits, advise other executive officials on state law, and prosecute actions on behalf of the States as authorized by state legislatures).

The roles of state attorneys general and state legislatures, therefore, are simply not the same. And the decision of one assistant attorney general to remove a case hardly reflects the type of "deliberation by the political process of the citizens of the State" required to subject a State to suit. *Alden*, 527 U.S., at 751.

It is immaterial that in most States the attorney general is an elected official. *See* STATE ATTORNEYS GENERAL: POWERS & RESPONSIBILITIES 15 (Lynne M. Ross, ed. 1990). While that renders an attorney general politically accountable in a general sense, a state attorney general does not participate in any deliberative "political process" through which policy interests are balanced and waivers of sovereign immunity carefully struck. *See Alden*, 527 U.S., at 751-52.

Indeed, as a practical matter, the Attorney General in any particular state does not, and could not, participate in every litigation decision made by the numerous assistants who defend thousands of cases each year on behalf of a State. For example, in a large State like Texas, the Attorney General employs more than 600 assistants to represent Texas in roughly 50,000 active litigation cases per year—not to mention nearly 10,000 additional non-litigation matters and approximately 187,000 child-support filings.[3]

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3. These numbers were derived from Texas's *Office of the Attorney General Agency-Wide Strategic Plan Measure Report: Legal Division*

And even in one of the smaller attorney general offices, such as Respondent Georgia's, 115 assistants handle in excess of 10,000 litigation cases and nearly 6,000 non-litigation matters. Plus, more than 3,000 additional matters (overwhelmingly litigation cases) are handled by outside "special assistants" who are not employees of Georgia's Attorney General's Office.[4]

It is not feasible for a State's attorney general to personally review and approve every litigation decision—including removal decisions—made by assistants defending the State in particular cases. Nor, certainly, could every removal decision be referred to the State's legislature for a determination whether immunity should be waived in a particular case. Moreover, some legislatures may not even possess authority to waive the State's immunity on a case-by-case basis—which would be the consequence of the waiver-by-removal rule advocated by Lapides and his *amici*. *See Ford*, 323 U.S., at 468 (noting that Indiana's legislature can waive immunity only by "general law"—*i.e.*, "general consent to suit in all similar causes of action"). Presumably, States could enact legislation empowering assistant attorneys general to waive immunity through each act of removal. But, again, that would be the prerogative of each State. *See id.*, at 467; *supra* Part I.C.

The United States erroneously suggests that the state-law nature of attorney-general authority renders it an inappropriate subject for determination by a federal court. U.S. Br., at 19 n.6. Federal courts, however, have long been applying *Ford*'s principles without apparent difficulty—even in the removal context. *See, e.g., Estate of Porter*, 36 F.3d 684, 690-91 (CA7 1994); *Silver v. Baggiano*, 804

Case Summary (9/1/00–8/31/01), *Office of the Attorney General Agency Employee System* (Aug. 31, 2001), and the Child Support Division's *Legal Action Report* (MR 2050RU): Year to Date Totals (Aug. 31, 2001).

4. These numbers were derived from the Georgia Attorney General's *Internal Workload Report* (8/1/00–7/31/01).

F.2d 1211, 1214-15 (CA11 1986); *Gwinn Area Cmty. Sch. v. Michigan*, 741 F.2d 840, 846-47 (CA6 1984); *Newfield House, Inc. v. Mass. Dep't of Pub. Welfare*, 651 F.2d 32, 36 n.3 (CA1 1981). *But see Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1233-36 (CA10 1999). A far greater disservice to the States would occur if the Court adopted a generic waiver-by-removal rule that ignored state law and the issue of a particular state attorney general's authority to consent to suit.

The importance of preserving a State's Eleventh Amendment immunity, notwithstanding removal of a case by an attorney general, is reflected by the rule that immunity can be invoked for the first time on appeal—indeed even, as in *Ford*, for the first time in this Court. 323 U.S., at 467. This rule correctly acknowledges that invocation of the Eleventh Amendment imposes restraints on federal judicial power. *Id.*

Moreover, permitting state defendants to raise the Eleventh Amendment for the first time on appeal ensures that States will not involuntarily be subjected to suit based on the defensive litigation action of an assistant attorney general who lacks authority to waive a State's immunity. By contrast, a blanket waiver-by-removal rule would compel unconsenting States to defend suits prosecuted against them in federal court—the very evil the Eleventh Amendment was enacted to proscribe. U.S. CONST. amend XI. And such a rule would be incongruous with a State's right to preserve its sovereign interests through assertion of Eleventh Amendment immunity for the first time on appeal. *See Estate of Ritter v. Univ. of Mich.*, 851 F.2d 846, 852 (CA6 1988) ("It would be anomalous, to put it mildly, to hold that, while the question of eleventh amendment immunity may be raised for the first time (and even *sua sponte*) in this court of appeals, the immunity has been waived by the [State's] having removed the case to federal district court and by its failure initially to assert the immunity question on this appeal.").

The principles established by *Ford Motor Co.* appropriately accommodate state law and its relationship to a state attorney general's litigation conduct. To ensure respect for the States' sovereign interests, the Court should reaffirm *Ford Motor Co.* and confirm its application in the removal context.

II. IT WOULD OFFEND THE STATES' DIGNITY TO PARSE SOVEREIGN IMMUNITY INTO DEFEASIBLE COMPONENTS AND CASUALLY DISCARD THE PORTION OF SOVEREIGN IMMUNITY EXEMPLIFIED BY THE ELEVENTH AMENDMENT.

Neither Lapides nor the United States disputes that it would be repugnant to state sovereignty and core federalism principles to strip States of their overarching, constitutional immunity from suit upon their removal of a case to federal court. *See* Pet'r Br., at 9, 31; U.S. Br., at 22. Both Lapides and the United States do, however, deem forfeiture of *Eleventh Amendment* immunity a fair price for removal. They attempt to diminish the significance of the Eleventh Amendment by dubbing it a mere source of "forum immunity." By doing so, they suggest that compelling a State to forfeit "forum immunity" under a waiver-by-removal rule is less offensive to the States' dignity than inferring a complete waiver of the States' constitutional immunity from suit. This misses the point. Because the States are entitled to the full benefits of their sovereign status, it offends the States' dignity to peel away the layer of immunity exemplified by the Eleventh Amendment, even if other deeper layers of immunity remain intact.

The States' "inviolable sovereignty" is not subject to piecemeal erosion, and the Court should decline the invitation to gradually chip away at the States' sovereign status. *Cf. Alden*, 527 U.S., at 745 ("We have often described the States' immunity in sweeping terms, without reference to whether the suit was prosecuted in state or federal court."). Depriving States of "forum immunity" is a direct assault on a central attribute of sovereignty that not only inheres in this nation's constitutional design, *see id.*, at 728-29, but

also is expressly embodied in the Constitution's text. U.S. CONST. amend. XI.

The fundamental significance of Eleventh Amendment immunity is confirmed by the "the shock and surprise throughout the country" that ensued when this Court, in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), held that the Judiciary Act of 1789 subjected States to suit in federal court by citizens of other States or of a foreign country. *Hans*, 134 U.S., at 11. This type of federal power over the States "had been expressly disclaimed, and even resented, by the great defenders of the constitution while it was on its trial before the American people." *Id.*, at 12. Consequently, in the first meeting of Congress following *Chisolm*, that body proposed the Eleventh Amendment with virtual unanimity; and the amendment was then adopted in due course by the legislatures of the States. *Id.*, at 11. In this remarkable chain of events, "[t]his amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and courts, actually reversed the decision of the supreme court." *Id.*

The history of the Eleventh Amendment reveals that so-called "forum immunity" was no small matter to the Framers and the people of the States whose legislatures ratified the Eleventh Amendment. Immunity from suit in federal court was a fundamental component of the constitutional design, and it should not lightly be cast aside. *See Atascadero*, 473 U.S., at 242 (noting that the "constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties" and the Court's "reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system") (internal quotation marks and citation omitted).

The consequence of a waiver-by-removal rule cannot be casually dismissed as a minor inconvenience to defendant States.

From a federalism perspective, usurpation of this aspect of state sovereignty is no less offensive than other impermissible invasions of state sovereignty this Court has deemed to violate the Framers' vision for our nation. This vision, as encapsulated in the Constitution, "specifically recognizes the States as sovereign entities." *Alden*, 527 U.S., at 713 (quoting *Seminole Tribe*, 517 U.S., at 71 n.15). And the immunity from suit afforded by the Eleventh Amendment, like other sovereign immunities inherent in the constitutional design, was designed to protect "the dignity and respect afforded a State." *Coeur d'Alene*, 521 U.S., at 268. To be faithful to the Framers' intent, therefore, the States' sovereign dignity must be respected—and it must be respected completely. Accordingly, the Court should reject the "forum immunity" waiver arguments advanced by Lapides and the United States and confirm that States retain all aspects of their sovereign immunity absent their express and unequivocal consent to suit.

III. A WAIVER-BY-REMOVAL RULE WOULD DESTROY STATES' ABILITY TO SATISFY COMPETING RESPONSIBILITIES AS SOVEREIGNS, EMPLOYERS, AND PROTECTORS OF THE PUBLIC GOOD.

A State may wear several different hats in the course of defending a lawsuit. At the most basic level, the State is a defendant. But, unlike most defendants, the State is also a sovereign. That means the State must protect both the public good and the public fisc. And that is not all. When a State is sued along with its employees, the State must consider the rights of those individuals who have been sued over actions taken in the course of public service. These individual co-defendants may wish to defend federal claims in federal court. But what if the suit includes state-law claims the legislature solely permits in state court?

With the benefit of removal, a State can ensure its employees a federal-court forum to adjudicate federal defenses like qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The

State can also, by invoking the Eleventh Amendment, respect its legislature's determination that the state-law claims not be heard in federal court. *See, e.g., Pennhurst*, 465 U.S., at 99-100 & n.9; *see also Coeur d'Alene*, 521 U.S., at 274 ("[I]t is acknowledged that the States have real and vital interests in preferring their own forums in suits brought against them."). Those claims, instead, could proceed in state court after a dismissal without prejudice or a remand by the federal court.

If, however, the Court were to adopt a rule requiring States to waive Eleventh Amendment immunity upon removal, this would all change. A State that acquiesces in employee-codefendants' preference for removal would sacrifice its legislature's express reservation of a state-court forum for state-law claims.

Then again, a State could abide by its legislature's directive by withholding consent to removal, causing the suit to remain in state court. *Chicago, Rock Island, & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 248 (1900). But this would disadvantage its codefendant employees, sacrificing their desire for not only federal-forum expertise, but also, quite possibly, the opportunity to interlocutorily appeal a denial of qualified immunity: Although *federal* adverse qualified-immunity rulings are interlocutorily appealable under the collateral-order doctrine, *see Mitchell v. Forsyth*, 472 U.S. 511 (1985), no comparable requirement exists in state courts. *Johnson v. Fankell*, 520 U.S. 911, 913 (1997). Instead, States are free to determine whether such an appeal should lie. And while some States recognize a right to interlocutorily appeal orders denying qualified immunity—either by statute, *see, e.g.*, TEX. CIV. PRAC. & REM. CODE §51.014(a)(5), judicial rule, *see, e.g.*, FLA. R. APP. P. 9.130(a)(3)(C)(vii), or caselaw, *see, e.g., Arneson v. Jezwinski*, 556 N.W.2d 721, 727 (Wis. 1996)—other States decline to guarantee immediate review. *See, e.g.*, GA. CODE §5-6-34(b) (vesting trial courts with discretion to certify orders for interlocutory appeal).

Thwarting employees' entitlement to interlocutorily appeal denials of qualified immunity is no small sacrifice. Qualified immunity was designed to strike a balance between vindicating civil rights and promoting public service by shielding government officials and employees from insubstantial civil rights claims. *See Harlow*, 457 U.S., at 818. As an immunity from suit, as well as liability, the benefits are "effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S., at 526. An interlocutory appeal is essential, therefore, to ensure that public servants will not be subjected to the burdens of undue discovery and trial prior to thorough review of their qualified-immunity defense. In that sense, the defense enables public servants to perform their duties and serve the citizens of their State without unwarranted litigation distractions. Indeed, avoiding "excessive disruption of government" was one of the policy rationales for creating the defense. *See Harlow*, 457 U.S., at 818.

If employees forfeit some of qualified immunity's procedural protections in a state forum, the increased threat of suit and liability could dissuade individuals from taking state jobs, in which case everyone loses. State employees should not sacrifice their right to federal adjudication of qualified immunity—and a guaranteed, federal interlocutory appeal—simply because they were sued along with the State. But that would be the consequence of a waiver-by-removal rule, since States would have no choice but to block removal to preserve state-court adjudication of state-law claims. Indeed, a waiver-by-removal rule might induce plaintiffs to sue the State in addition to employees—purely to impede removal. Such manipulative litigation conduct should not be encouraged.

From a fairness perspective, moreover, plaintiffs are not disadvantaged when a State removes a case to federal court and then asserts Eleventh Amendment immunity on barred claims. As Lapides and the United States acknowledge, States would retain all "non-forum" immunities from suit notwithstanding removal. *See*

Pet'r Br., at 9, 31; U.S. Br., at 22. Thus, if a plaintiff's state-law claim would fail in state court, it also would fail in federal court. There is no meaningful advantage, therefore, to compelling States to forfeit Eleventh Amendment immunity upon removal.

Nor would plaintiffs lose any federal-court advantage in suing a State under 42 U.S.C. §1983, since a State is not a "person" subject to suit—in any court—under that statute. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). If anything, a *state defendant* might remove a case to ensure fair adjudication of its *Will* defense, since state courts do not always faithfully apply *Will*'s holding. *See, e.g., Tex. Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 581-82 (Tex. 2001) (reversing a court of appeals' s judgment directing trial to proceed on §1983 claims barred by *Will*). State defendants should have the option of seeking dismissal of §1983 claims under *Will*, while also asserting, in the alternative, Eleventh Amendment immunity from suit in federal court, just as Respondent Georgia did in this case. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 779-80 (2000) (holding that courts may address a State's suability under a federal statute prior to Eleventh Amendment immunity); *Schacht*, 524 U.S., at 390; *McClendon v. Ga. Dep't of Cmty. Health*, 261 F.3d 1252, 1258-59 (CA 11 2001).

At most a plaintiff who wishes to sue both state and individual defendants on federal and state-law claims might have to litigate in two forums. Although the United States protests that the States have no right to require this result, U.S. Br., at 21-22, State *Amici* beg to differ. "A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst*, 465 U.S., at 99-100 & n.9. If the plaintiff, as master of his complaint, wishes to bring both state and federal claims against the State and its employees, that choice may come at the price of litigating in two courts. That is simply the practical, and constitutionally appropriate, consequence of suing a State.

In the past, the Court has not inquired into "the reason or expediency of the rule which exempts a sovereign state from prosecution in a court of justice at the suit of individuals" but has simply "declared its existence" and enforced the rule. *Hans*, 134 U.S., at 21. Here, too, the Court should not examine the expediency of a State's decision to remove a particular case and assert Eleventh Amendment immunity. The Court need only recognize that the Eleventh Amendment's prohibition against suit in federal court exists—and that it applies to removed cases just as it applies to any other federal suit "prosecuted against one of the United States."

CONCLUSION

The Court should affirm the Eleventh Circuit's judgment.

Respectfully submitted,

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